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COMMITTEE ON JUDICIARY
March 3, 2005
LB 178, 536, 535, 57, 116, 609

The Committee on Judiciary met at 1:30 p.m. on Thursday, March 3, 2005, in Room 1113 of the State Capitol, Lincoln, Nebraska, for the purpose of conducting a public hearing on LB 178, LB 536, LB 535, LB 57, LB 116, and LB 609. Senators present: Patrick Bourne, Chairperson; Dwite Pedersen, Vice Chairperson; Ray Aguilar; Jeanne Combs; Mike Flood; Mike Foley; and Mike Friend. Senators absent: Ernie Chambers.

SENATOR BOURNE: I think we'll go ahead and get started. Welcome to the Judiciary Committee. This is our 18th day of committee hearings. We're hearing six bills today. I am Pat Bourne, I'm from Omaha. To my left is Senator Aguilar. He is from Grand Island. I'll introduce the other members as they arrive. We can get through this introduction as they get here. Keep in mind that throughout the afternoon senators will come and go. If they happen to leave while you're testifying, please don't take offense to that. They're simply conducting other business. If you plan on testifying on a bill, please sign in in advance at the on-deck area where Senator Kruse is at. Print your information so that it's legible and can be entered into the permanent record. Following the introduction of each bill, I will ask for a show of hands to see how many people intend to testify on that particular measure. The introducer of the bill will go first. Then we will take proponent testimony, opponent testimony, and then lastly we will take neutral testimony and then the introducing senator has the right to close if they choose to do so. When you come forward to testify, please clearly state and spell your name for the benefit of the transcribers. All of our hearings are transcribed so your spelling of your name will help the transcribers immensely. Due to the large number of bills heard here in the Judiciary Committee we utilize a timing system. Senators introducing bills get five minutes to open and three minutes to close. All other testifiers get three minutes to testify. Three minutes to testify exclusive of any questions that the committee may ask you. The blue light goes on at three minutes. The yellow light comes on as a one-minute warning, and then when the light turns red we ask that you conclude your testimony. The rules of the Legislature state that there are no cell phones allowed in committee hearing rooms so if you have a cell phone please disable it so the ringer doesn't go off and disturb the

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testifier. Reading someone else's testimony is not allowed. If you have a letter from a group or an organization we'll be happy to accept that from you and enter that into the permanent record but we won't allow you to read them. Laurie Vollertsen is our committee clerk and Jeff Beaty is the legal counsel and, again, I'll introduce the other members as they arrive. Can I have a showing of hands of those here to testify on LB 178 as proponents? I see five. As opponents? I see none. Are there any neutral testifiers on this bill? I see one. Senator Kruse to open on LB 178.

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SENATOR BOURNE: I think our colleagues are out on the golf course, Senator Kruse (laughter). It's a nice day.

SENATOR KRUSE: (Exhibits 1, 2) (laugh) Well, my staff just came and rescued me from lunch so I'll try to recover. Senator Bourne and members of the committee and staff, LB 178 has been amended to a white copy, 0607, amendment 0607 is what I'm going to be looking at. This bill was...

SENATOR BOURNE: Senator, do we have copies of that amendment? Well, we have the green copy of LB 178.

SENATOR KRUSE: Do we have white copies? Okay. I can come back to this other one. Thank you for noting that. This has been commonly called the use and lose bill. It's been around for awhile in various forms. There are a number of changes that we have made with that extensive discussion with a variety of groups and so I would warn you to pay attention to this copy and not just to make assumptions. And I'm going to speak to more the number of changes. The aim of the bill is to create a disincentive for adults to provide alcohol to minors and to dissuade minors from attempting to get alcohol or to use it. So let me speak to the number of changes. Number one, we may have spoken of revocation in the past. This is impoundment. It's for short defined times: 60 days for first offense; 90 days and 120 days. Along with that the DMV shall be notified when an impoundment takes place but must remove the action from the permanent records. In other words, this is not to apply to points, it's not to penalize this young person over a long

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haul. It's not to have insurance implications. The whole point of it is to get their attention. And I'm sure others will speak to that but the youth have told us that 30 days would not be likely to get their attention but 60 days would. So that's why we start with the 60 days to get their attention. Then we've added this. We say we should also get the adults' attention so we're providing for the same penalty for the adult who provides alcohol as we would apply to the youth who takes it. The adults would be subject to impoundment of license. And the fourth one...excuse me, I held this back because it came later and you were getting it around. The fourth one is another amendment and comes out of the discussion that I heard before when I was here, Mr. Chairman. A frustration that several were expressing that minors can play games with having the ability to drink at home or a place of worship. I think that's terrible public policy to have a law that technically agrees to (laugh) a situation where a youth may become drunk in their own home. My thought on that was to make it illegal to have more than one drink at home. Thank goodness, I have a legislative staff who says, that won't work. You can't get into the home and do that. So our solution on this and if you can come up with another solution, fine, but I feel very strongly on this that we ought to take away the game playing. Our solution is that you can't leave home with more than one drink in your system. So that's what is in the amendment that's being passed around now. You cannot leave a home or synagogue with more than .02 and, hopefully, then that will take care of the game playing and I don't have to spell that out to you. We've all heard about it from anecdotes where the youth out there will say well, I was drinking but I was drinking at home. And I haven't been doing anything out here and so on. We don't need to teach youth how to wink the law. We want to take it seriously. So, I would stop at that point now, Mr. Chairman. Welcome to questions.

SENATOR BOURNE: Thank you. We've been joined by Senator Friend from Omaha and Senator Pedersen from west Omaha. Are there questions for Senator Kruse? Seeing none, thank you.

SENATOR KRUSE: Thank you.

SENATOR BOURNE: The first proponent, please. And, again, would the proponents of this measure make their way to the

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on-deck area and sign in? Mr. Moylan, welcome.

JIM MOYLAN: Yeah, Mr. Chairman and members of the committee, I'm Jim Moylan, M-o-y-l-a-n, appearing on behalf of the Nebraska Licensed Beverage Association which is a state association of liquor retailers. We're here to support this bill. And the bill has been in before and I've been here to support it before. And I think what better way to deter a minor from purchasing or possessing alcoholic beverages than to suspend his driving privileges. I think that would make any minor think twice before, you know, he possessed or used alcoholic beverages, think twice before he got caught too, I'd say (laugh). But I just think this is probably one of the greatest deterrents we could have. Now the big issue has always been minors and alcohol, minors and alcohol. We've heard it every year down here around the Legislature. We hear it everywhere. And everybody wants to just kind of slap their fingers with legislative bills here and there and proposals here and there, you know. Let's bite the bullet. Let's give them something to think about. Let's take their license. If one license was suspended in a high school for six months the whole school would know about it. And don't you think probably that would be a great deterrent to the rest of them when they see their one friend had lost his license, that they probably wouldn't want to use alcoholic beverages either. Now we support it. I have no objections to the amendments. However, we don't think this ought to apply to retailers or the holders of a licensed retail alcoholic beverage issued by the Liquor Control Commission. As it's written, it would provide that the suspensions would also apply to a liquor retailer. Now I think it probably ought to apply to people who are not retailers that are purchasing liquor and giving it to minors. You know, if they're over 21, buying it and giving it to minors, we think it probably ought to apply to them so. If there's any questions, I'd be happy to try to answer them.

SENATOR BOURNE: Thank you. Are there questions for Mr. Moylan? We've been joined by Senator Flood from Norfolk.

JIM MOYLAN: Thank you.

SENATOR BOURNE: Seeing no questions, thank you. Next

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proponent.

MARTY CONBOY: Good afternoon, Mr. Chairman, ladies and gentlemen of the committee. My name is Marty Conboy, C-o-n-b-o-y. I'm the city prosecutor in Omaha here in support of LB 178. This is a resurrection of a bill that many of you have probably seen or heard of before. It is a bill that would in most part add a penalty to being a minor in possession of alcohol. We have talked to offenders and I think, although he's not here, Senator Chambers has asked and even this year reminded us that is there a direct relationship between the penalty increase and the violation which I think is an important one. In this particular case, young offenders have said repeatedly that the most serious sanction that they fear is the loss of their driver's privilege. We have changed our driving license laws much like other states to have what is called the graduated license. We recognize the importance of bringing young people into the driving world and that there is a relationship between their behavior, just things like having too many kids in the car or being out too late and their safe driving. Certainly that is the biggest risk they face in their age group. This would add that penalty, something that they treasure, something that I think Mr. Moylan was very correct in saying if not through the actions directly of the Legislature the anecdotal discussion of what would come would be very important. That this penalty would have a direct relationship on their behavior and that's what this statute is about. It's different this year in that it does not create a license suspension. It is an impoundment. The period of time suggested in this bill now is much less than it has been in the past. It would not be an offense that required a reinstatement, an SR 22. It would be really, I guess, a minor but I still think important penalty that would greatly impact the behavior of these young people. It is a danger we recognize that these kids being out in public, I think that aspect of it is also important as well, create a risk. We always bring it up in the Legislature these days because it is a huge risk to young people. We recognize the danger that they face, the biggest dangers in their lives and want to try and make a difference. The Legislature has tried both through policy and law to make a difference. And this bill, I think, including the aspect of making it unlawful to be out in public. And we don't really...it doesn't matter where kids drink whether it's at

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church or at home where it's legal. When they're out in public they face the same dangers as the kids who drink in the park or at somebody's house, at a party because it's the effects of the alcohol we're concerned about not the possession or drinking. I mean, that really is the end result and this bill would bring into the consideration of those kids that would drink in Iowa or wherever they drink, it doesn't matter. We would now have a law that would govern that. I'd be happy to entertain any questions, if you have any.

SENATOR BOURNE: Thank you. Questions for Mr. Conboy? Seeing none, thank you. Next testifier in support.

TIM KEIGHER: Good afternoon, Chairman Bourne and members of the committee. My name is Tim Keigher. That's K-e-i-g-h-e-r. I appear before you today in support of LB 178 on behalf of the Nebraska Petroleum Marketers and Convenience Stores Association. Also, I have a letter from Kathy Siefken with the Nebraska Grocers Association. She was unable to be here today and wanted me to pass that along as well. I guess just simply put, we feel that this bill provides accountability for minors and we think that that will help deter minors from purchasing alcohol and echo the comments that Mr. Moylan made. And with that, I'd be happy to answer any questions. (See also Exhibit 3)

SENATOR BOURNE: Thank you. Questions for Mr. Keigher? Seeing none, thank you. Next testifier in support?

SUSIE DUGAN: Good afternoon, Senator Bourne and members of the Judiciary Committee. My name is Susie Dugan and I am with PRIDE-Omaha, Incorporated which is a nonprofit organization dedicated to preventing the use of alcohol, tobacco, and other drugs by young people. And we are here today in support of LB 178. Although I have not seen the amendments, the principle is what we are here supporting. We have supported, I think, for over a decade, this bill has been here in many different forms. And the reason it keeps coming back is because alcohol is still the number one cause of preventable death among our young people here in Nebraska. The Nebraska Youth Risk and Protective Factor Survey of 2003 found that almost 80 percent of our high school seniors report that they have tried alcohol. And within the past 30 days, almost 50 percent report that they

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have had something to drink in the last 30 days. We are losing too many of our young people and that's why this is such an important issue. I hope that as we look at solutions that we look at a whole comprehensive set of solutions that holds everybody accountable but this LB 178 would at least hold young people accountable and teach them that this is a serious, serious issue.

SENATOR BOURNE: Thank you.

SUSIE DUGAN: Thank you.

SENATOR BOURNE: Questions for Ms. Dugan? Seeing none, thank you. Next testifier in support?

DIANE RIIBE: (Exhibit 4) Hi, Senators. My name is Diane Riibe, R-i-i-b-e and I'm the director of Project Extra Mile whose mission is to prevent underage drinking and do that through reducing youth access to alcohol as well. We're here in support of LB 178 and thank Senator Kruse for introducing it. I'd like to just make note that we know of at least 33 other states that have a similar kind of proposal or similar kind of law so it is not a new ground again that we would be forging. We also know, as Susie mentioned, that the vast majority of our high school students and then beyond consume alcohol at some point. We know that alcohol is a significant contributing factor in the top three causes of death for kids, unintentional injuries which include motor vehicle crashes, suicide and homicide so it's not an issue that we feel we can ignore very easily. The loss of driving privileges is a significant deterrent for young people. There's some research out of Missouri and Pennsylvania that indicates that those young people who have a license action against them have a lower crash likelihood and then go on to have fewer violations in general which is a significant result. We would also be supportive of including adults who would procure and provide for minors because, again, and as you well know, we often work and look at the retailers and I think that's important and will continue to do that. But we also need to look at the social availability of alcohol to kids so we would be supportive of that as well. I could go on but I just thank you for giving serious consideration to it. Unfortunately, the state, as Marty mentioned there are some issues, and Senator Kruse, issues that need to be

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looked at to close some loopholes we have in our minimum drinking age law and we either do it now or we just wait and let more kids be injured and killed because that's literally what's happening across the state. So I would urge you to do something and to look at this language and if it needs some changes let's talk about changing some things as opposed to just being done with it. So we would urge your serious consideration of it and thank you.

SENATOR BOURNE: Thank you. Questions for Ms. Riibe?
Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. I just need to say thank you for what you're doing.

DIANE RIIIBE: Oh, thank you.

SENATOR Dw. PEDERSEN: I'm sitting here and not asking any questions or anything does not mean that you're not heard. You might remember, I've carried this bill at least twice myself and...

DIANE RIIIBE: Absolutely.

SENATOR Dw. PEDERSEN: ...very much in support of it. I hope we can get something...

DIANE RIIIBE: There's one vote. Thank you, Senator.

SENATOR Dw. PEDERSEN: ...I hope we can get something done with it.

DIANE RIIIBE: Thank you very much.

SENATOR Dw. PEDERSEN: You and Susie have worked real hard and others in this area and we don't always agree on everything but what you're doing is very, very good work.

DIANE RIIIBE: Thank you, Senator Pedersen.

SENATOR BOURNE: Further questions? Seeing none, thank you.

DIANE RIIIBE: Thank you.

SENATOR BOURNE: Next testifier in support.

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HOBERT RUPE: Good afternoon, Senator Bourne, members of the committee. My name is Hobert B. Rupe. I'm the executive director of the Nebraska Liquor Control Commission and without being too repetitive, I would...

SENATOR BOURNE: If you could spell your last name for us, please.

HOBERT RUPE: Rupe, R-u-p-e. My apologies.

SENATOR BOURNE: Thank you.

HOBERT RUPE: I would say ditto to a lot of what Ms. Riibe just said. You know, this is somewhat out of our purview. We deal primarily in the administrative side and the suspension of the retailers' licenses but we strongly believe that a multifront battle on minors drinking is needed and by this legislation which puts, you know, one of the things they hold most dear at risk, perhaps, they, the clerks who are making the sales and the owners of the liquor establishments might treat this as seriously as we try to do so if this...and unless there's any other questions.

SENATOR BOURNE: Thank you. Questions for Mr. Rupe? Seeing none, thank you.

HOBERT RUPE: Thank you.

SENATOR BOURNE: Next testifier in support?

BRIAN NELSEN: Hello, my name is Brian Nelsen, N-e-l-s-e-n. I'm a senior at Creighton Prep in Omaha, Nebraska. And I guess basically I just came today to give you the perspective of a minor in terms of this bill that we're trying to pass. I think that underage drinking is a huge problem and it's really evident. I see it every day at school and I hear about it in other schools. I hear about it on the weekends all the time. And I think that in terms of what a minor like myself might hold in terms of what's valuable is probably the license is probably one of the highest ones. I think that taking away your license would have a huge effect. Just, I know if you pass the bill that just hearing about it that would spread all over my school

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really quick. And I know a lot of people would be opposed to it so I think that it would be certainly more effective than giving MIPs and things like that because I hear about people getting MIPs all the time. I have friends that have gotten MIPs and it has a good short term effect. It scares them and gets their parents mad at them, hopefully, but other than that it eventually fades away and it's kind of becoming a common thing to get because so many people do it so I think that losing your license would have a good effect because it's something you have to try to cope with. You have to arrange for a ride to school and you have to arrange to go to work and but it's, you know, 60 days, 90 days, 120 days isn't a really long time also. So it would just be an inconvenience for awhile and so it would help deter underage drinking I think so. I'd be happy to answer any questions.

SENATOR BOURNE: Thank you. Are there questions for Mr. Nelsen? Senator Flood.

SENATOR FLOOD: Thank you very much, Mr. Nelson, for your testimony. I appreciate you coming up here. And I agree with what you're saying about the license revocation. You know, Buffalo County, if you get arrested...if you're arrested and convicted a minor in possession in Kearney, for instance, it's a mandatory...it's my understanding, mandatory two days or 48 hours in the Buffalo County Jail. How effective would that be and I agree with the bill, but how effective would two days in Douglas County Correctional Institute be in Douglas County?

BRIAN NELSEN: I know that that would affect me if I knew that I could go to jail for that (laughter). And I'm pretty sure it would affect pretty much anybody but I also think that that kind of has a short term effect too. Eventually, it would fade away and kind of just become a memory because it's only two days. It would be a huge inconvenience and I think that it's in some respects, in a lot of respects, it's more effective than an MIP even.

SENATOR FLOOD: Thank you, appreciate it.

SENATOR BOURNE: Further questions? Mr. Nelson, you're going to Creighton Prep? Most kids from Prep go to college. Do you think you'd have to disclose that you were in jail if

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you went to apply for a school?

BRIAN NELSEN: Well, yeah, and I think that has a big effect on...but most people don't think about that when they're going to be drinking on the weekends. You think about your license on the weekend, you know, if you're drinking. It's like if you go out to drive you might lose your license or if someone finds out you're drinking you might lose your license. You don't really think about okay, well, I have to apply to a college tomorrow and are they going to notice this, you know. It surely affects you but not right away.

SENATOR BOURNE: Further questions? Seeing none, thank you. Appreciate you coming down and testifying.

BRIAN NELSEN: Thank you.

SENATOR BOURNE: Next testifier in support? We've been joined by Senator Combs from Milligan. Just now leaving. Welcome.

TOM DARGY: Hello. My name is Officer Tom Dargy. Last name spelling D-a-r-g-y. I'm with the Bellevue Police Department. I'm here to speak on behalf of the legislative bill before you to get a perspective of a street officer when he's out there, deals with minors as far as arresting them as well as adjudication of the offenses. When the minor is arrested a great majority of them are not really fazed by a citation that we give them or the court appearance. Most of them have family members, neighbors, stuff like that, that have been through it that, you know, for the most part they're going to receive a small monetary fine for the most part or they do some type of community service hours to work off that. Today's age, in my opinion, a \$100, \$200 fine. It is not sufficient enough for a deterrent and as far as the community service goes, you're speaking with a lot of the juveniles after that. I don't really get, when asked, is this something that's going to deter you from doing it in the future? Most of them kind of give you a shrug of the shoulders or a half-hearted kind of oh, yeah. I never get anything, a real affirmative yes on that it's a deterrent for them. By including the provisions of the bill suspending a minor's license I believe that we're going to be sending a loud message to them. For a 16-, 17-, 18-year-old kid to lose his driver's license for a

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month or two, I think is a powerful message and it's one that will be spread throughout the school, that it will definitely affect students and have an effect on that. I think also that in the future we're also setting them up in the mind-set for how powerful alcohol can be for when they get older too, maybe to impact some of the crimes that we have committed by alcohol once they achieve an older age, DWI, et cetera, and stuff like that. I feel by starting now and making this bill we're going to actually gain attention and it's going to be more of a deterrent than actually what we have now. Thank you.

SENATOR BOURNE: Thank you. Questions for Officer Dargy? Seeing none, thank you.

TOM DARGY: Okay. Thank you.

SENATOR BOURNE: Other testifiers in support? Are there testifiers in opposition? Testifiers neutral?

BEVERLY NETH: (Exhibit 5) Chairman Bourne, members of the committee, I'm Beverly Neth, B-e-v-e-r-l-y N-e-t-h, director of the Department of Motor Vehicles, appearing today to offer neutral testimony regarding LB 178. It appears that the intent of the bill is to provide for the impoundment of a driver license for a minor in possession violation. Impoundment is a defined term in the Motor Vehicle Operator License Act and refers to the court's power to hold a driver license. The bill seems to imply that the impoundment status would appear on the driver's individual record of abstract thereby providing access to the impoundment status to law enforcement and to the Department of Motor Vehicles. Nebraska Revised Statute 60-497.01 requires the courts to report violations of the rules of the road and of the Motor Vehicle Operator's Licensing Act to the department. For several years now, the courts have used the Nebraska justice system to electronically transmit the violation information to the DMV. The department notes the violation proposed in LB 178 will be part of the Liquor Control Act. There is no provision in statute authorizing the courts to report Liquor Control Act violations to the DMV for inclusion on the driver record abstract. If the committee wants the minor's license impoundment proposed by LB 178 to be included on the driver record abstract, then specific authority will need to be added to the bill so that the courts are required to

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report the violation to the department. If the impoundment status is not transmitted to the DMV, neither DMV examiners nor law enforcement officers will have any means of knowing that the court has impounded the driver license. An individual whose license has been impounded by the court could simply go to any county and apply for and obtain a duplicate driver license as a way to get around the lack of physical possession of the driver license. I'd be happy to answer any questions you may have regarding this issue.

SENATOR BOURNE: Thank you. Questions for Director Neth? You were testifying to the white copy of the bill which has replaced the green?

BEVERLY NETH: Yes.

SENATOR BOURNE: You're aware of that amendment.

BEVERLY NETH: I'm aware there is an amendment and have just reviewed that and it looks as though the language in the amendment would be satisfactory to achieve the objective of reporting the violation from the court to the DMV.

SENATOR BOURNE: Okay. Thank you. Further questions? Thank you.

BEVERLY NETH: Thank you.

SENATOR BOURNE: Are there neutral testifiers? Senator Kruse to close.

SENATOR KRUSE: Thank you, Mr. Chairman. I was so excited being first up to bat today that I forgot who I was so for the record I am Lowen Kruse, K-r-u-s-e, District 13. I really appreciate those who have testified to add to this lot and remind us of the history. In particular, I want to acknowledge that down through the years Senator Pedersen and I and others have recognized this as a youth driven proposal. They're the ones that keep pushing us and saying that this is what would get their attention. I would acknowledge that the words that impoundment and revocation are different words and for those that weren't here at the beginning this is clearly impoundment and the second amendment is necessary in order to keep track of that. Otherwise, the records won't be correct. There's another

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piece in terms of the youth driven part of it. Since we've started on this we have discovered that steady drinking by teenagers creates permanent brain damage. We did not know that four or five years ago. And permanent brain damage is a matter of public policy, I think that we need to start paying attention to because when I was young we might could go out there and work with our hands but the people that are going out there now, the teenagers and the minors, are going to need their brains. And so it's a serious matter for us. I would acknowledge Mr. Moylan's suggestion and I think that amendment needs to be made. We certainly would support that. We made a quick reference just to state it shortly to a section on page 2 there that refers to the words, uses the word sell. We're not after those who sell. We're trying to make it equal between an adult who's playing games, with a youth who's playing games. And saying both of them should have their license impounded so that we aren't hitting the youth harder than the adults. Also, I feel strongly that we need to take care of the house or synagogue. I should add to that, if you want to remove house and synagogue exceptions I have no problem with that at all. I think it's a bunch of eyewash. But I think we need to correct it so that it works well there. And, finally, amend away as someone else has said, if you find ways to improve this let's do it. We've been at it long enough. Let's do it. I thank you.

SENATOR BOURNE: Thank you. Questions for Senator Kruse? Seeing none, thank you.

SENATOR KRUSE: Thank you.

SENATOR BOURNE: That will conclude the hearing on LB 178. Senator Synowiecki to open on LB 536. As Senator Synowiecki makes his way forward, can I have a showing of hands of those here to testify in support of LB 536? I see three. Those in opposition? I see one. Those neutral? I see two. Senator Synowiecki.

LB 536

SENATOR SYNOWIECKI: (Exhibit 9) Thank you, Senator Bourne and members of the Judiciary Committee. My name is John Synowiecki. I represent District 7 from Omaha. Today I

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bring LB 536 for your consideration, a bill to authorize a liquor licensee, their agent or employee to detain a minor attempting to purchase alcoholic liquor. LB 536 would also allow the licensee, agent, or employee to confiscate the identification used in the purchase or attempted purchase. Current Nebraska statute establishes that a minor misrepresenting his or her age is guilty of a Class III misdemeanor. I introduce LB 536 as a tool to provide a strong deterrent for minors from even attempting to purchase liquor. I contend that if minors are fully aware that the possibility of detainment exists for even attempting to purchase alcohol they will less likely proceed with the decision to attempt the purchase. LB 536 is modeled after the current shoplifting statute that allows for a reasonable detention when probable cause exists that a shoplifting crime is being committed. If probable cause exists to detain a minor, the licensee, employees, or agents would be immune from civil or criminal liability for slander, libel, false arrest, or false imprisonment. This legislation does not require a licensee to detain a minor but merely provides the option of detainment. Therefore, retail licensees who do not have an adequate number of staff to detain a minor would not be required to do so. Currently, all retail liquor establishments are required to post a notice to persons under 21 that warn against minors attempting to purchase alcoholic liquor. I can envision with the passage of LB 536 licensees predominately posting their right, under the law, to exercise their authority to detain. This bill creates a credible deterrence and immediate consequences for minors not adhering to that warning. Just as in the shoplifting statute the detention must be reasonable in manner and length of time. However, if an unreasonable detention is utilized the licensee would be held liable. I believe this provision provides adequate motivation for licensees to use only reasonable means of detainment. LB 536 offers retail licensees the option to be proactive in deterring minors from purchasing alcohol and it provides for swift and immediate consequences for minors that attempt to purchase alcohol. I want to thank you, Senator Bourne, members of the Judiciary Committee for giving your full consideration to LB 536.

SENATOR BOURNE: Thank you, Senator. Are there questions?
Senator Aguilar. (See also Exhibits 6, 7)

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SENATOR AGUILAR: Senator Synowiecki, what happens when said minor decides to resist and doesn't want to be detained?

SENATOR SYNOWIECKI: Well, what happens in a situation when a shoplifter doesn't want to be detained? What happens now under current law relative to that? They're physically detained and held until a peace officer can arrive, Senator Aguilar. That's how it's currently done in our shoplifting statutes.

SENATOR AGUILAR: And the person if there's injury to the minor the person isn't liable? I'm asking because I don't know.

SENATOR SYNOWIECKI: Yeah. It's patterned after the shoplifting statutes and it's permissive. The retail liquor licensee by no means is required whatsoever to detain a minor. I like the bill because of its deterrent impact, I think, Senator Aguilar. I think when I talk to youngsters in my district they tell me that those that consume alcohol will go from bar to bar to bar until finally they can get the alcohol. In other words, they're denied, they're denied, they're denied, and then they find that one place where they have the alcohol. You know, perhaps, perhaps if it can be conveyed to minors that retail liquor licensees reserve the right under the law to detain them and that they can't go from bar to bar to bar until they finally get the booze, that it may have...provide a second thought to them to embark on attempting to purchase the alcohol. That's the intent behind the bill is the deterrent value with it.

SENATOR AGUILAR: Thank you.

SENATOR BOURNE: Further questions? Senator Synowiecki, do peace officers have training in order for them to know what probable cause is?

SENATOR SYNOWIECKI: I would assume they do, Senator. I...

SENATOR BOURNE: One of the things that troubles me a little bit about what's in your bill is that we're going to say that a licensee or their agent or employee is not criminally or civilly liable if they believe there's probable cause that the minor was attempting to purchase or had. And as a layman, I'm not certain what probable cause is. I think I

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know what it is. I'm not quite sure. So the clerk at the 7-11, how...is there going to be a training element so that they know what probable cause is in order...?

SENATOR SYNOWIECKI: Well, I think the layman's interpretation, Senator Bourne, is if an individual comes into your place of ownership, your proprietorship and attempts to purchase alcohol and you ascertain that they, in fact, are not old enough then that, I think, would be probable cause. I think one of the important aspects of this is that and it's these licensees' very livelihood that is put at jeopardy by minors coming in and attempt to purchase alcohol. You know, if there was a result of a minor misrepresenting his age to a licensee, you know, that puts the licensee's livelihood in jeopardy and so that, again, speaks to the deterrent value of this with due respect to licensees in our state that attempt to run their businesses in a responsible manner, that they would have a remedy available to them if they have reasonable cause to believe that an individual is not old enough and they can ascertain that with a fake ID or whatever it might be and they hold them. The police officer then can come and take control of the situation and decide at that point whether or not an arrest should be executed or not.

SENATOR BOURNE: Further questions? Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Senator Synowiecki, I guess do you really see if say, somebody goes into a Gas 'n' Shop or a convenience store and there's one person behind the counter. Chances are they're probably not going to have the time to detain somebody whereas maybe this would be more likely used with a bouncer outside of a bar in downtown Lincoln possibly. Is there a...

SENATOR SYNOWIECKI: Again, I'll just emphasize it's entirely discretionary. If they do not want to utilize their option, reserved in the law that would be under LB 536 to detain, they don't have to.

SENATOR FLOOD: Can they use handcuffs?

SENATOR SYNOWIECKI: It says in a reasonable manner and if there would be a petition in front of a court or a civil lawsuit or something, I guess that would be...if they use

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unreasonable means, they would be held liable.

SENATOR FLOOD: For the record, would you like to make handcuffs part of, you know, that your intent to make the use of handcuffs a reasonable manner?

SENATOR SYNOWIECKI: No, that is definitely not my intent. Not to...again, I'll just...it's discretionary, it's up to the licensee whether or not they even utilize this option that would be reserved of them under the law. What I like is the deterrent value, the deterrent impact, I believe, which is embodied in the legislation.

SENATOR FLOOD: What about locking them in a room? Do you think that's reasonable?

SENATOR SYNOWIECKI: You know, what happens now, I've been at a couple of stores where I've witnessed shoplifters being apprehended, if you will, by store employees. And what I personally witness is them physically restraining them, physically until the cops arrive. So I think locking them in a room is a lesser detainment measure than the physical restraint. So I would think that would be reasonable myself, a layman's interpretation.

SENATOR FLOOD: If somebody had a heart attack while in the custody of a bar owner or a Gas 'n' Shop or wherever, who's responsible for the...I mean, don't we get into liability issues there if I have a heart attack while I'm being detained at a gas station?

SENATOR SYNOWIECKI: You know, Senator, I've never really given any thought in terms of if one would suffer a medical condition while being detained for violating the law. You got to remember, they're attempting to violate the law. There's probable cause to believe that the licensee has to have reasonable suspicion or reasonable cause to believe that they attempted to violate the law. Now if there would be a medical occurrence that occurred subsequent to that while they were waiting for a police officer to come and do the lawful thing, I don't know, quite frankly. I guess it would depend on if did that detainment cause the heart attack would be the question.

SENATOR FLOOD: Or a seizure or.

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SENATOR SYNOWIECKI: Um-hum.

SENATOR FLOOD: Thank you.

SENATOR SYNOWIECKI: Um-hum.

SENATOR BOURNE: Senator Aguilar.

SENATOR AGUILAR: Senator Synowiecki, your answer to Senator Bourne's question, you kind of articulated one of my concerns. You said, this person is attempting to violate the law and is actually, in essence, messing with the owner's livelihood. My concern is, at that point, that owner is mad. This guy's trying to mess with his livelihood. He's mad. Now that minor resists being detained. I mean, that's a perfect situation for a confrontation and that's my concern. Let me go on to say I fully understand what your intent is...

SENATOR SYNOWIECKI: Um-hum.

SENATOR AGUILAR: ...and I agree with your intent but I think this is kind of a collateral damage that goes along with it is what I'm trying to say.

SENATOR SYNOWIECKI: Yeah, and I understand that. I think the same analogy can pertain to retail store owners. When you go in and shoplift merchandise, I think you're putting that store owner's livelihood in jeopardy. I think you are. And...

SENATOR AGUILAR: Not to this extent, though.

SENATOR SYNOWIECKI: Well, I mean, some of the shoplifting activities by those that participate in that illegal activity, you know, if you go into a store and shoplift in excess of \$1,000 worth of merchandise and particularly for a small scale operation, Senator, I would say that that does put the livelihood in jeopardy.

SENATOR BOURNE: Senator Pedersen.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Senator Synowiecki, is it legal now to hold the license? To keep

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the ID?

SENATOR SYNOWIECKI: You know, from what I understand, I think the Liquor Control Commission is here and they could probably better authority to answer that question. From what I understand, Senator Pedersen, licensees do not have the statutory authority to hold the licenses now but they do, and they do routinely. And perhaps, perhaps if that is the case, if the detainment provisions of LB 536 gives this committee too much heartburn I would at least hope that you would carry within the bill the right of the licensee to at least hold the license and to turn it over to law enforcement.

SENATOR DW. PEDERSEN: Yeah, I like that part of it. I think that, that we need to make that legal so...because you can always use, they've always got their own picture on it. At least we have that much so you could turn it over to law enforcement and they'd possibly have time to find somebody and to find a parent or family. And then most of the time there's the right addresses and stuff on them that could be used as a deterrent.

SENATOR SYNOWIECKI: What I would request is that we ascertain to answer that question, whether or not they do have the statutory authority to do that. And if they do not, that we can send out LB 536 with at least the license recovery provisions.

SENATOR DW. PEDERSEN: Because this restraining really concerns me. You start restraining...well, now if you restrain somebody in Elkhorn you got about a five- to ten-minute response from the police department. If you got it in Omaha you're talking about 20 or more minutes and it's (laughter)...it makes quite a big of difference, you know. Slipped that one in there on the chairman (laughter). There's a lot, there is a lot of difference. And you've got to be really built and up there going if you're going to hold somebody for 20, 25 minutes and have the staff. And you're going to have to have the bouncers. This is scary.

SENATOR SYNOWIECKI: Well, the same wait occurs, Senator, with the retail for shoplifters as well. You know, the retailers have this authority under statute now to detain someone that attempts to shoplift within their store and

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so...

SENATOR DW. PEDERSEN: I've seen it too but I sure wouldn't do it.

SENATOR BOURNE: Further questions? Senator Friend.

SENATOR FRIEND: Just really quickly. Thank you, Senator Bourne. Senator Synowiecki, Senator Flood and I were talking. Let's say he and I are playing, you know, Texas hold 'em at home and I said, you know what? Go get some beer. Well, of course, we wouldn't be playing for money. But he runs out, forgets his wallet, goes down to the corner store. They wouldn't card me. That's why I'm using that analogy (laughter). They card...the guy cards him, says you...

SENATOR FLOOD: My youthful appearance.

SENATOR FRIEND: ...yeah, cards him and says you're...I don't like this. You know, and we've both seen it on TV. They lock the doors and he can't get out. I'm following the line of questioning here. And, Senator, the thing is, the analogy probably is a pretty decent one with somebody trying to do some shoplifting but it is a little bit different. Somebody stuffs some stuff into their coat and they're trying to get out that door, I think that there is...I would submit to you and I would ask for your observation, a bit of a difference between that and what we're talking about here, the attempt and actually doing it. Somebody's saying, I'm taking this stuff and there's nothing this retailer can do about it because they're not going to catch me, tries to make his way for his or her way for the door. And they're busted. In this sense, the person is either innocent or guilty but not really yet. If that retailer sells him the booze then the criminal act has occurred? I mean, I guess I'd ask for your observation on that. The purchase has been made then the criminal...then that is the criminal act. Is the attempt the criminal act, I guess? And I'd ask for your observation.

SENATOR SYNOWIECKI: Yeah. Well, I'll just read the bill. It says, probable cause to believe that a person under 21 years of age is attempting to purchase or has purchased. So the attempt to purchase would be included in the bill.

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It is right now.

SENATOR FRIEND: And so I asked you a double-ended question here but that's where I think maybe some of our trepidation comes in. We can talk about it and...

SENATOR SYNOWIECKI: And I understand, I understand.

SENATOR FRIEND: ...work through it.

SENATOR SYNOWIECKI: You bet, Senator.

SENATOR FRIEND: Thanks.

SENATOR BOURNE: Further questions? Thank you.

SENATOR SYNOWIECKI: Thank you.

SENATOR BOURNE: First testifier in support?

JIM MOYLAN: Mr. Chairman, members of the committee, I'm Jim Moylan, M-o-y-l-a-n, again representing the Nebraska Licensed Beverage Association and we're in support of this bill. As Senator Synowiecki mentioned, you know, we've had this on the books for close to 40 years for the retailers and under the shoplifting laws. It says, attempt to purchase...remember, that is an offense just like shoplifting. It's a violation of the law. And the reasonableness is pretty much up to the individual. I think there's various ways that he could handle it reasonably. If the person resists and he wants to let him go, he has his license. He could let him go, call the police, and say this kid attempted to purchase beverages in here. The police go out and get him and give him a citation at home. You've still got various avenues that the retailer can use. You go about...and the physical aspect of it. I don't think you would probably ever see that under an attempted purchase. You do see physical restraints in establishments, in large ones when they have bouncers at the doors. If there happens to be any problems, you know, they do physically restrain people. I don't recall anybody ever having been sued over something like that but I am sure it has happened. But this also gives them immunity. Now I think if they went beyond the bounds of reasonableness then you have a fact situation, you know, for a lawsuit. The probable cause, if he shows ID

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and requests a six-pack of beer and he's ready to purchase it and the bartender notices that it's a false ID or that he's underage then that's not only probable cause. That would be enough to convict him beyond a reasonable doubt right there. So you certainly would have probable cause under those circumstances and you're going to have the same evidence when it would come to trial and you'd have to, you know, prove it beyond a reasonable doubt. And there's no doubt in my mind that, you know, that would establish probable cause rather easily, you know. So for the retailers, we appreciate it along with the other bill. In fact, I'd even recommend you combine the two of them. Now if you don't want to accept that part like Senator Synowiecki said about detaining the individual. I think keeping the driver's license, you know, retaining it, give them the chance to retain that, you know, would be fine. A lot of them do it now. I have had cases before the Liquor Commission when they've had minor sales and the commission wants to know, you know, how they feel about and what you're doing, you know, about not serving minors. And they'll bring a box of I.D.'s down that they have confiscated and that shows that well, at least they're trying to do something to prevent the minors from coming in. They have taken a lot of licenses, you know, and prevented them. So whether they have it or not, a lot of the retailers are going to do it. But the important thing is, it's not mandatory so thank you.

SENATOR BOURNE: Thank you. Questions? Senator Flood.

SENATOR FLOOD: Thank you for your testimony, sir. I was listening to your testimony. You were talking about probable cause will be determined by the court. Let's say I go in and I do try and purchase alcohol and I don't have my license on me and then I get roughed up by one of these rent-a-cops, placed in handcuffs, shoved in the back room. They take me down, they book me. I bond out of jail. I go to court, I hire a lawyer and then three months later they determined (a) they didn't have the probable cause and (b) I was over the age of 21. And I've racked up \$3,000 in legal bills. Maybe I've got a bum arm because the guy behind the counter decided to shove me into a wall. Who's responsible then?

JIM MOYLAN: Well, I think that goes to a retailer who would

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be totally unreasonable in doing that type of activity. And if he did, you'd probably have a lawsuit.

SENATOR FLOOD: But there's immunity here because if he says I had what he believed to be probable cause to detain me before the police arrived you're giving them an out. What I described to you, I don't think is necessarily unreasonable under what could potentially happen under this bill.

JIM MOYLAN: I think it would be kind of unreasonable. Number one, I don't think you'd have probable cause if, you know, he didn't have any evidence how old you were whether you're old enough or not old enough. I don't think he'd have probable cause.

SENATOR FLOOD: So in cases where they don't present an ID and a 15-year-old goes in there then they shouldn't be detained? A 15-year-old, if a 15-year-old doesn't present any identification?

JIM MOYLAN: Well, I...if you can't present identification then they're not going to sell him. So they're not going to sell him and if they couldn't prove how old he was at the time, you know, then I don't think they'd have probable cause to detain him under those circumstances.

SENATOR FLOOD: What about handcuffs? Do you think they should be able to use handcuffs?

JIM MOYLAN: Oh, I don't think so in this business.

SENATOR FLOOD: How about a locked room? Can they use a locked room?

JIM MOYLAN: They do it in a lot of shoplifting cases, I think, you know, in stores. And a locked room, no, no. I think most of them would be probably, you know, reasonable and say, why don't you just come over here and sit down here in this booth until the police officer arrives, you know. If he decided to get up and run, let him run. He's already got his license.

SENATOR FLOOD: But don't you think it's conceivable...

JIM MOYLAN: We'll get you at home then. Huh?

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SENATOR FLOOD: ...you tell a 20-year-old, why don't you just have a seat here while I call the police? And they'll come and arrest you in ten minutes. Do you think it's conceivable that that youngster may decide he's going to leave and then you've got a rambunctious attendant and they tackle him in the parking lot and then they start rolling around in the gravel and is that possible sometimes?

JIM MOYLAN: I think that through the training program the retailer would have regarding this would probably be no physical contact and if they do decide to leave, we'll keep the ID and we'll call the police and let them go arrest him at home. We will not restrain them under any circumstances. I don't think reasonable would go into that much trouble and cause, you know, any damages whatsoever. If they did then they've got a lawsuit.

SENATOR FLOOD: But you wouldn't really need a law if you wanted to do...you can just buy a chair and sit it next to the cash register and say, there's the chair you sit in when we get ready to call the cops. You sit there and we'll call the cops. You can do that. It's voluntary. Can't you?

JIM MOYLAN: Yeah, you could do that.

SENATOR FLOOD: So we wouldn't need this, this law.

JIM MOYLAN: Well, in...well, just in case, we would like the immunity part of it, you know, in case somebody did decide to sue, you know. And there was nothing but a reasonable, you know, detaining of the individual. We would like the immunity for doing that, you know, so.

SENATOR FLOOD: Well, I appreciate it. Thank you.

JIM MOYLAN: You're welcome. Thank you.

SENATOR BOURNE: Further questions? Thank you. Next testifier in support.

TIM KEIGHER: Good afternoon, Chairman Bourne and members of the committee. My name is Tim Keigher. That's K-e-i-g-h-e-r. I appear before you today in support of LB 536 on behalf of the Nebraska Petroleum Marketers and

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Convenience Stores Association. And once again, I have a letter from Kathy Siefken of the Nebraska Grocers Association in support of this bill as well. I guess listening to the previous testimony, I guess we're looking for anything that is a deterrent from minors trying to purchase alcohol. We're held accountable for minors if we sell it to them. While this bill I think is a great attempt at trying to come up with a solution, maybe it isn't perfect yet. But I would like to see the committee try and work towards some solution that we could help deter minors from purchasing and with that, I'd try and answer any questions.

SENATOR BOURNE: Thank you. Questions for Mr. Keigher? Seeing none, thank you. Next testifier in support?

MARTY CONBOY: Good afternoon, again. I'm Marty Conboy from Omaha and just very briefly, I had kind of toyed with the idea of being neutral, although I am very much in support of the idea of taking the licenses. Right now most merchants do take licenses and we encourage it but we don't do anything to protect them or give them a statutory right. It's just, I think, a responsible thing that most do. This would not have much liability concern and wouldn't be a huge imposition to at least tell the minor if that's really a legitimate license, wait here till the police get here, however long it takes and we'll straighten this out. The portion with the immunity for liability I would submit just based on the questions that were asked. There is a large body of law that already exists in terms of false imprisonment and even asking somebody to sit by the door while the police come, in many cases, has been held to be false imprisonment. It is a huge body of law, one of the largest lawsuits faced by most commercial establishments and so they're very careful to have policies and constraints on how they do that. Sometimes they do lock people up or put them in rooms if they are resistant but in most cases if they're particularly resistant they just recognize they're going to leave. But those people who flee are much less likely to come back and try it again. And that deterrent effect would certainly make the stores safer in the long run. It is a concern any time a Legislature allows private individuals to use force. This really isn't, I guess, specifically, permission to use force but it does have the implication that if that's necessary and reasonable that they can. But I would also add very quickly that if you

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read cases, there are a huge number of cases where merchants have been held liable for what we might even think seems pretty reasonable. And the courts have said it's not and we'd see that same kind of constraint here, I'm sure.

SENATOR BOURNE: Thank you. Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Mr. Conboy, thanks. If Senator Flood went home tonight and tried to, you know, shoplift at Shopko, is Shopko immune if they try to, you know, keep him, you know, he gets hurt in a scuffle and there was unreasonable force used. Is the same type of statutory language for that? I mean, is Shopko okay, they're immune from that type of liability?

MARTY CONBOY: No. The immunity only applies to a very reasonable and limited amount of conduct so, basically, you have to identify yourself, say you've got to stay here where the police are coming. If somebody pulls away and starts to resist you certainly have the opportunity to try and stop them but it's very limited. And the number of cases that I see and we see thousands of shopliftings, where there is some sort of confrontation is probably less than 1 percent and the majority of those it's...once it gets beyond just trying to lead them back into the store they're instructed just to let them go. It's not worth the risk to an employee making \$6 an hour to wrestle somebody in the parking lot.

SENATOR FRIEND: Right. So you think managers at some of these department stores and things are actually saying, look, you better, you know, you better make sure that this can be done effectively and reasonably or else just, you know, get out of the way, let them run.

MARTY CONBOY: Correct. That is universal, I can tell you. And the lawsuit judgments are huge for those who don't train and adhere to those kind of policies.

SENATOR FRIEND: Okay, thanks.

SENATOR BOURNE: Further questions? Mr. Conboy, I'm curious. Would the reasonableness apply to the escalation if I go to restrain somebody as a merchant and they hit me and I hit them back and it goes back and...does the reasonableness extend then to the perpetrator for lack of a

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better words, conduct?

MARTY CONBOY: To a great extent, yes. As long as it's, I guess, necessary to continue to try and detain the person and as long as they initiate the conduct which requires that sort of response. The cases I've read all say that that falls within the category of reasonable.

SENATOR BOURNE: So the scenario that Senator Flood indicated where pretty soon the guy's got an injured arm, you know, because of an escalated confrontation, that could still be reasonable.

MARTY CONBOY: Yeah, it really is a matter of the civil courts to decide that.

SENATOR BOURNE: Do you read...I assume you've read the bill.

MARTY CONBOY: Yes.

SENATOR BOURNE: Do you read that there has to be probable cause for the immunity to apply?

MARTY CONBOY: Absolutely.

SENATOR BOURNE: That's how you interpret the bill?

MARTY CONBOY: Yes. In fact, with the scenario that Senator Friend mentioned about Senator Flood, now unless he's got like his 2006, you know, the senior class of Fremont High's shirt on, just the fact that he doesn't have I.D. is probably going to give the clerk the opportunity to say I'm not going to sell to you. But there's still not probable cause that he's broken the law. If he does have that kind of an indication of phoney I.D. or some other indications that he's, you know, just a teenager then it might rise to the level of probable cause. And, again, the civil courts are going to be the ones that have to eventually decide those parameters and their judgments, I think, would be a pretty good deterrent to excessive behavior.

SENATOR BOURNE: Senator Flood.

SENATOR FLOOD: Thank you, Chairman Bourne. Mr. Conboy,

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good to see you again.

MARTY CONBOY: Good afternoon.

SENATOR FLOOD: I guess and you're a lot more familiar with this in Omaha, but isn't it true that the police departments counsel bank tellers and store clerks not to pursue a suspect after an armed robbery or some type of an incident similar to, you know, a robbery where a weapon is used?

MARTY CONBOY: Are you saying they're trying not to or?

SENATOR FLOOD: They're trying not to. They try and train them not to.

MARTY CONBOY: Yes. For safety, obviously, that's not much to be gained in those cases.

SENATOR FLOOD: Isn't it possible, and I can imagine I already know your answer to this but one of the folks coming in, one of the minors coming in to purchase at a gas station alcohol, has a weapon on them or some type of a gun that could be used if a scuffle ensued?

MARTY CONBOY: That's possible, probably a lot less likely than a thief. As I say, we've prosecuted thousands of minors and have yet to run into one that's that desperate but it is possible. There's always that...and certainly, especially if some clerk locks the door, pulls out the handcuffs, they're going to, you know, react very unpredictably.

SENATOR FLOOD: Would the handcuffs concern you?

MARTY CONBOY: Yeah, and again, we don't see that very often but some stores do employ those if they're necessary in retail situations. And those things are...the locked room and so forth, always a concern.

SENATOR FLOOD: Thank you very much.

SENATOR BOURNE: Further questions? Mr. Conboy, do you read the World-Herald?

MARTY CONBOY: Yes.

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SENATOR BOURNE: Do you remember an article recently regarding police response times in Omaha?

MARTY CONBOY: Yes, I do.

SENATOR BOURNE: Do you remember what the average police response time is? (laughter)

MARTY CONBOY: I believe that officially it's less than ten minutes.

SENATOR BOURNE: I think you're right.

MARTY CONBOY: That is...

SENATOR BOURNE: I knew as a man in law enforcement, you would know the answer to that (laughter). Seeing no...oh, further questions? (laughter) Senator Pedersen.

SENATOR DW. PEDERSEN: The other question, was that a response from the policemen themselves or from the administration of the city? (laughter)

MARTY CONBOY: I understand there's some disagreement about how that's calculated. I...

SENATOR FRIEND: You mean the administration currently?

SENATOR DW. PEDERSEN: Yes (laughter).

SENATOR BOURNE: Mr. Conboy, thank you.

MARTY CONBOY: Thank you.

SENATOR BOURNE: Appreciate your testimony. Other testifiers in support of this measure? Testifiers in opposition?

SUSIE DUGAN: Senator Bourne and members of the Judiciary Committee, again, my name is Susie Dugan, D-u-g-a-n, and I'm with PRIDE Omaha, Inc. And we appear today to oppose LB 536. We do applaud Senator Synowiecki for keeping ahead of trying to find ways to solve this really serious problem that we have with our young people and alcohol in this

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state. And we are in support of the license confiscation, we have no problem with that. But it seems that there is so much potential for abuse and there's no research that shows that this would be effective in deterring kids. And for that reason, we would like you to look at other options that would deal with trying to reduce those numbers that we have of kids trying to purchase and of using. But there are other better ways and we would just oppose LB 536.

SENATOR BOURNE: Thank you. Questions for Ms. Dugan? Seeing none, thank you. Next testifier in opposition? And, again, we're going to make use of the on-deck chairs to expedite the hearings.

TIM BUTZ: (Exhibit 8) Good afternoon, Senator Bourne, members of the committee, my name is Tim Butz, B-u-t-z. I'm here on behalf of ACLU Nebraska. I think the committee has identified some of the concerns that you'll find in my written statement. Let me say that I think it's not a very accurate comparison to compare attempted purchase of alcohol with shoplifting. When someone goes into a store and shoplifts they remove the property or attempt to remove the property, they've committed a crime. And when they go in and attempt and are unsuccessful in purchasing alcohol under current law, I don't think there is a crime, and this would make it a crime. But the problem that we see in this thing is this vesting of police powers in private parties. We're going to ask a lot of minimum wage workers to make determinations that police officers go to class for hours and hours. What's reasonable cause? What's the proper use of force? Those kind of things are well spelled out in Nebraska law, especially the use of force aspect and officers have to attend training in order to know it. Even those large retail outlets that have professional loss prevention people such as Target train their people in these areas. There's nothing here that would require anybody to be trained on what's probable cause and what's reasonable force. And as far as the response time, I know there's some joking about it and I actually was kind of amused to see a Creighton Prep student here because in my neighborhood there were two Creighton Prep students who had a party every time their parents were out of the house on Saturday night. And I would call the Omaha police and say, hey, you got a minor in possession party going on at 2 a.m. and I can't get to sleep and two hours later maybe they would show up. The

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problem is, minor in possession calls are low in the priorities of the Omaha police. Obviously, they don't want to be out writing MIP tickets when there's people plowing into trees or whatever else is going on at 2 a.m. The comparison of...that Senator Friend made to Senator Flood trying to buy things. I think actually your own committee counsel, Mr. Beaty, is, you know, looks 17 and I bet he could give us some situations where he's been carded. And I wonder about, you know, what happens when a store clerk doesn't believe a young-looking person is actually the person on the I.D. Do they detain him and, if so, what force do they use and what recourse they have? I think there's vague and imprecise language in this bill that should kill it. The part about confiscating the licenses, I think that's something that could be worked around as long as there was a reasonable process to make sure that people such as Mr. Beaty who might get his license snatched, are able to get it back. In the end, I think this bill is just fatally flawed and, you know, I'd put it to rest and be done with it.

SENATOR BOURNE: Thank you. Questions for Mr. Butz? Seeing none, thank you.

TIM BUTZ: Thank you.

SENATOR BOURNE: Next testifier in opposition? Are there neutral testifiers?

HOBERT RUPE: Good afternoon, again. Once again, for the record, my name is Hobert, H-o-b-e-r-t, last name is Rupe, R-u-p-e. I'm the executive director of the Nebraska Liquor Control Commission and I was trying to figure out where I would talk at, support, opposing, or neutral because we like part of this proposal and we have some qualms about some of the other parts. First of all, the part we really like is the ability, give the ability to a retailer to confiscate an identification. And so long as they then contact law enforcement and have them come out and get it. That serves a twofold purpose, we think. A, if it is their real license you're going to know who they are anyway. And, B, if it's a fake I.D. it's a way to get it off the streets and destroyed. One concern we would have about the confiscation of the license would be that when they do it they can't damage or alter the license. Unfortunately, during some of

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the compliance checks which have been conducted by the Nebraska State Patrol, a retailer early on in the night's checks figured out it was a check, grabbed the I.D. before the officers could come and he cut it in half. Therefore, ten more checks which were scheduled to use that cooperating individual were totally invalidated because that person's identification was destroyed. So the confiscation, we're in favor of so long as it's limited to that prohibition. One of the issues that the commission has with it is actually, and it's a very technical issue, is where it's attempting to be putting the Liquor Control Act. The current bill seeks to have a place in 53-101 which is the statutory prohibition which says...this is the Liquor Control Act. Given the nature of this, it should be more appropriately placed somewhere back in 53-180, perhaps, and a whole new section, 53-180.08 would be my recommendation of where to put whatever comes out of committee because 53-180 is the section which deals on minors attempting to purchase and also for sale to minors by a clerk. The one concern we would have and we're not sure exactly how to look at it because we do know the language is primarily based upon the existing shoplifting law and so far everybody has been under the assumption that when we're dealing with a convenience store where they're coming in and they're trying to run out the door. Those kind of cases don't concern me as much as somebody attempting to purchase from the inside of a bar not so much because of what's going to happen with the clerk there, but if somebody's trying to...they're trying to detain them you'll have other people who are over 21, some of whom have been consuming alcohol and we see quite a few problems with disturbances anyway. And we were thinking, you know, if either...they'll see the bar owner trying to pick on this poor kid and/or they'll see this kid trying to screw over their favorite bar owner. Either way it sort of raises a volatile situation to us that is outside of somebody trying to walk out of a Target or a Wal-Mart with something underneath their coat. It's throwing an element in there that is not readily identifiable as to how they're going to react. So those are the concerns and the issues that the commission has. Once again, we're strongly in favor of the ability for them to confiscate the license. So is there any questions?

SENATOR BOURNE: Questions for Mr. Rupe? Senator Aguilar.

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SENATOR AGUILAR: Yeah, Mr. Rupe, there was earlier testimony that some people are confiscating the licenses now. If that leads to a subsequent arrest, how is that even legal because they admittedly did an illegal seizure?

HOBERT RUPE: Well, for one thing they're not going to be an agent of the law enforcement officer at that time. Therefore, I don't think that the fact they were confiscating them could be held against subsequent arrest. My concern more would be a conversion action being brought that, you know, basically they're taking someone else's property when they're seizing that and conceivably, you know, you can charge them with either theft or a criminal, you know, conversion charge at that time. You know, this is one of those things that the commission hasn't really ever dealt with specifically but when we saw this bill we realized, you know, we probably should give these licensees who are attempting to make sure that, you know, that things are being conducted according to the law, the coverage they would need to confiscate the licenses.

SENATOR BOURNE: Further questions? See none, thank you.

HOBERT RUPE: Thank you.

SENATOR BOURNE: Next testifier in a neutral capacity?

DIANE RIIBE: Good afternoon, Senator Bourne, members of the committee. Again, my name is Diane Riibe and I'm director of Project Extra Mile. We would be...it's interesting, as I was preparing to come up and thinking about this in the days ahead and then sitting here, I don't know if I've ever been before a committee where a bill had proponents, opponents, and neutral testifiers who had pretty much all the same points to make in terms of their concerns. We would also be supportive of allowing retailers to retain the license because, again, and that happens pretty regularly at this point. We've assisted law enforcement doing compliance checks in the Omaha area and then beyond in the outer part of the state. And it's not uncommon at all for licensees to hold and retain that license. We see kind of an increasing problem, though, with those licensees actually destroying that property or locking it in a safe and unable to get it for, you know, forget police response times but manager sleeping in the middle of the night kind of thing. So that

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is a growing concern in terms of being able to continue those operations at some level. I would also say that in doing those compliance checks it was asserted earlier that if the license wasn't presented then you wouldn't have an issue. In fact, the businesses that do sell to minors, anywhere between 40 and 50 percent of those we find aren't asking for the I.D. at all so there's not a license actually involved. So the decision would be made based on simply whatever that probable cause would be or hunch. Our concern comes again with the, as others have said, with the detaining of the minor. One of the issues that's not been mentioned and I want to make sure that the committee is aware of. Currently, Nebraska Statute does not disallow a server from consuming alcohol while on the job and that adds a larger element to the whole issue because you have the potential of someone who's actually there working, being in charge, if you will, and potentially consuming or consuming alcohol and then potentially attempting to detain someone. We would strongly oppose that portion of the proposal if it moved out of committee so thank you.

SENATOR BOURNE: Thank you. Questions for Ms. Riibe? You mean you'd support adding language that would prohibit a server from imbibing during the work hours?

DIANE RIIBE: Well, that portion, of course, which isn't even being discussed technically but the proposal that's before the committee, retaining the license would be something we would have no problem with but detaining the minor, we would oppose strongly.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thank you.

DIANE RIIBE: Thank you.

SENATOR BOURNE: Further testifiers in a neutral capacity? Senator Synowiecki to close? Senator Synowiecki waives closing. That will conclude the hearing on LB 536. Can I have a show of hands of those here to support the next bill, LB 535? I see five. The opponents to this next bill? I see one. Those in a neutral capacity? Would the proponents make their way to the on-deck area and sign in, please? Senator Synowiecki, LB 535.

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SENATOR SYNOWIECKI: (Exhibits 10, 11) Senator Bourne, members of the Judiciary Committee, I am John Synowiecki. I represent District 7 in Omaha. Today for your consideration, I bring LB 535 on behalf of the Domestic Violence Coordinating Council and domestic violence advocates across the state. LB 535 changes provisions relating to assault in the third degree and domestic assault in the third degree. I have distributed an amendment to LB 535 striking lines 1 through 7 on page 4 and would recommend the amendment's adoption by this committee. The intent of LB 535 is to make existing domestic assault language more consistent with existing assault language. Currently, a person is guilty of assault in the third degree if he or she intentionally, knowingly, or recklessly causes bodily injury to his or her intimate partner or threatens another in a menacing manner. The definition of domestic assault in the third degree is significantly narrower. Currently, a person is guilty of assault in the third degree if he or she intentionally and knowingly causes bodily injury to his or her intimate partner or places by physical menace his or her intimate partner in fear of imminent bodily injury. Third degree domestic assault statute currently does not include recklessly as an element of the offense and is limited to physical menace. I believe it is logical and appropriate to resolve these differences in statute. LB 535 also addresses multiple victim characteristics with domestic violence offenders by expanding language relative to subsequent violations to include any intimate partner rather than the same intimate partner. It is not entirely uncommon for domestic violence offenders to perpetrate against multiple victims over time and I believe our statute should provide tools for prosecutors to address this appropriately through enhancement procedures. There will be others testifying after me who have firsthand knowledge of domestic assault cases in Nebraska and are qualified to answer specific questions about the application of this bill. I want to thank you, Senator Bourne and members of the committee, for your consideration of LB 535.

SENATOR BOURNE: Thank you. Questions for Senator

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Synowiecki? Seeing none, thank you.

SENATOR SYNOWIECKI: Thank you.

SENATOR BOURNE: First testifier in support?

MARTY CONBOY: (Exhibit 12) Good afternoon. Once again, Marty Conboy, city prosecutor from Omaha. Last name is C-o-n-b-o-y, also the legislative chair of the Domestic Violence Coordinating Council in Douglas County. This is a bill that has been, I guess, brought forward to augment the existing domestic violence assault law that we have in Nebraska. Some of it is borne on the fact that we have things that need to be changed and improved with the law but none of these are tremendously controversial. I think you'll see that they make sense. One, for instance, the very first change just adds he or she just to make this thing gender neutral. Also the term reckless which applies to all regular assaults in Nebraska was omitted from the domestic violence bill last year. And that would be, I guess, necessary to bring this law up to date with all other assault cases, certainly all the case law and other rulings regarding assault would apply more accurately. Although recklessness is not a common element for assault, it does occur and this I think would be an important gap to fill. The relationship between the most serious consequences of domestic violence, that being homicide and serious injury, are very frequently associated with repeat offenders. People with domestic violence battery in their histories are the most likely to cause the most serious damage. We look at the...the test of that is to look at people involved in domestic violence homicides and serious injuries. And so often they have a history of this type of behavior. Those that have a domestic violence assault on their record should be treated more seriously when they reoffend before they become killers or people who, you know, set people on fire and the sorts of things that we actually see happen in the real world. Not a lot of people are going to be convicted of this offense but those who are at the top of the pyramid of danger presented by batterers and domestic abusers. And this law would make that a Class IV felony if they continue to offend, at least giving some protection to the community. When I say the community, the existing law provides that that enhancement only occurs if the victim is the same victim from the prior offense. We've found from experience

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that oftentimes batterers have other relationships in the future which then cause another victim to be put at risk and we believe that if there is a subsequent victim, even if it's a different one, that that previous offense should be allowed to enhance the current offense. I have some documents that this basically is just a summary of and bullet points of the changes provided by the statute. Be happy to answer any questions the committee has.

SENATOR BOURNE: Thank you. Are there questions for Mr. Conboy? Seeing none, thank you. Next testifier in support?

MARC DELMAN: (Exhibit 13) Before I start, members of the committee, I do have a letter of support from the Omaha YWCA and my glasses are not to be an affront to any of you, I recently had a cornea transplant and I'm real light sensitive so that's the reason for the dark glasses. Members of the commission, my name is Marc Delman and I have been engaged in the practice of criminal law for the past 25 years. I'm currently a deputy county attorney with Sarpy County. During my 25 years as an attorney, I have spent 12 of those years as a prosecutor in both Douglas and Sarpy County and the balance as a criminal defense attorney. I hope you will agree that this background gives me more than adequate experience and expertise to speak knowledgeably on the issue pertinent to LB 535 which brings me here today. The statistics on incidents of domestic violence nationwide show its proliferation. The National Crime Victimization Survey of 1998 estimated that over one million violent crimes were committed against persons by their current or former spouse or their intimate partners. Further research indicates that anywhere from 3.3 to 10 million children annually witness assaults by one parent against another. While LB 535 is not legislation that will address all the heartbreak and complexities involved in domestic violence it will provide law enforcement with the necessary steps to managing it. By allowing us to add "recklessly" to the domestic violence statute it gives its proper potency. In this way, we bring it in line with the other assault statutes codified by our laws. As the law currently reads, a stranger can be charged with recklessly causing bodily injury of another yet an abusive spouse or intimate partner can commit this act with impunity. The most important function of LB 535 is to replace the language of same

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intimate partner to any intimate partner. It's paramount that we hold repeat offenders accountable. Statistics show that 47 percent of abusers assault their intimate partners at least three times a year. The risk of violence continues during separation and after divorce. Minnesota police report that almost half of all battered women are victimized by an ex-spouse or partner. Statistics further show that when the abuser leaves his intimate partner and takes up with a new partner the behavior that the abuser has continues with the new partner and in some cases he will abuse both the past and present partner. From my own experience as a criminal defense attorney, I can corroborate the occurrence of this behavior. I have represented numerous individuals who would engage in abusive behavior against their partner, leave and take on a new partner and abuse them also. One individual that I represented was married four times and each partner was subjected to physical abuse at home by his hand. Sadly, without extensive intervention abusers don't change their behavior and some studies indicate that the abusive partner will continue their abuse even after aggressive treatment. This bill would allow us the mechanism to protect not only past and current victims of the perpetrator but also to protect their new victims. A new partner should have the protection from the abuser's behavior and only by recognizing such assault as repeated crime can we bring the gravity to this charge. The criminal justice system must hold the abuser accountable for such behavior. This will be accomplished if we're able to enhance the penalty and to change the language to protect the victim. Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Delman? See none, thank you. Next testifier in support? Oh, I'm sorry, whenever you're ready.

SUSAN MICHALSKI: Oh, okay. Good afternoon, Senator Bourne and members of the committee. My name is Susan Michalski, M-i-c-h-a-l-s-k-i. I'm a long-term survivor of domestic violence and I didn't know 25 years ago half of what I know now about domestic violence. And I didn't know when I met Mr. Wonderful, Mr. Knight in Shining Armor, that he had just gotten out of jail for assaulting his former girlfriend after he had stalked, threatened, and ultimately caught up with her and beat her to a pulp. At that point in time, I had one conversation with her and she said, run for your

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life and so I got it after a very short period of time. And it took me four years to actually get away from this person. In that period of time, he violated three restraining orders. There were not protection orders at that point in time and when he ultimately caught up with me and ultimately severely assaulted me that's when he got the slap on the hand, got put into jail and then he got out and it was business as usual. And I had the opportunity to kind of watch him over time through the record at a safe distance, a daily record. After me he assaulted and went to jail for three other women for short periods of time. He continued to assault and harass other individuals in that period of time and so I knew how to keep my safe distance. One of the things that I know that you've heard recently is some very compelling testimony from Cassandra Cates. I was absolutely appalled, yet not at all surprised, to find out that this was the same perpetrator...the same monster that had been married to my cousin and had assaulted her and harassed her prior to and during and after their divorce as well. So these people continue to do the same types of behavior because it's business as usual and because history repeats itself. I can tell you that 25 years later I still have a safety plan in my own head. I know that I need to keep a safe distance from this person. I know a lot more about intimate partner violence today than I did 25 years ago, and so I would implore you and ask you to support LB 535 because I know from my own history and seeing the history of perpetrators that history repeats itself. And I know that this bill would help keep victims of domestic violence safe from perpetrators. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Ms. Michalski? Seeing none, thank you.

SUSAN MICHALSKI: Thank you.

SENATOR BOURNE: Appreciate your testimony.

SUSAN MICHALSKI: Thank you.

SENATOR BOURNE: Next testifier in support?

JOAN SKOGSTROM: (Exhibit 14) Good afternoon. My name is Joan Skogstrom spelled S-k-o-g-s-t-r-o-m and I'm the executive director of the Domestic Violence Council in

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Douglas County, a nonprofit organization that advocates on behalf of the entire community for victim safety and to hold offenders accountable. The council operates the domestic violence program. As part of the court watch program we publish a quarterly report and have as a regular article the Chronic Domestic Violence Offender Chronology. This chronology article is in every report to highlight the fact that domestic violence offenders all too often engage in repetitive patterns of criminal behavior both to their intimate partner and against the general public. Chronic domestic violence offenders exhaust our systems and they deplete our communities of valuable resources both human and financial. I have provided the committee with copies of six court watch report chronic domestic violence offender chronology articles. Because of time, I am going to address two of them. In our recent report of the first quarter in '04, that particular chronic domestic violence offender in just the last five years has had five domestic violence convictions against three separate victims, has had three protection orders granted against him, and has also had two felony drug convictions and more charges for a total of 195 entries on his criminal record including robbery, use of a weapon to commit a felony, trespassing, and improper child restraint. And finally, at the time of the report, fourth quarter of 2003, that particular individual had 11 protection orders granted against him involving eight separate victims, has had ten domestic violence cases brought against him resulting in seven convictions and numerous other criminal entries. I am here in support of LB 535 and hope that you pass it out of committee.

SENATOR BOURNE: Thank you. Questions for Ms. Skogstrom? See none, thank you. Next testifier in support?

MATT KAHLER: Good afternoon, I'm Matt Kahler, K-a-h-l-e-r. I'm a deputy county attorney in Douglas County in the Domestic Violence Division. I'm here on behalf of LB 535. I'll be brief as the other prosecutors have hit on most of the issues that I would speak on today. I just want to state our office is in support of this bill and, in particular, in making the language of 28-323 consistent with 28-310 and adding the reckless element and the threatening in a menacing manner language which I believe will help the statute to encompass a wider range of conduct that the statute has intended to protect victims from. In addition,

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we are also in support of changing the language to hold reoffenders responsible for assaulting any intimate partner. I think this will give us, again, a tool to deal with these reoffenders and to prevent them from being able to have a clean slate with respect to enhanced ability once they begin their pattern of violence with a different partner in a relationship. And I'll be happy to take any questions.

SENATOR BOURNE: Thank you. Are there questions for Mr. Kahler? See none, thank you.

MATT KAHLER: Thank you.

SENATOR BOURNE: Next testifier in support? First testifier in opposition?

JOE NIGRO: Good afternoon. My name is Joe Nigro, N-i-g-r-o. I'm an attorney in the Lancaster County Public Defenders Office. I'm also a member of the Nebraska Criminal Defense Attorneys Association. I'm here to speak in opposition to this bill and I guess I would question the necessity for the bill and my concerns are based primarily on what I feel will...this bill will cause an incredible stress on an already overworked criminal justice system. And what I'm looking at primarily is the cost and most of the commentary or discussion previously has to do with this domestic violence assault law, third degree domestic violence. What I'm concerned about is that this would give the state the ability to enhance the third degree assault. A subsequent offense would become a felony and in our office alone, for misdemeanor assaults last year, we represented people prosecuted by the city attorney's office on 153 assaults and then misdemeanor assaults prosecuted by the county attorney's office it's close to 600 cases. And our county attorney's office filed some offenses under the municipal code and some under state statute. They get to make that decision and on domestic violence cases frequently they will file charges under the city code for a couple of reasons. One, if they think the charge is less serious but it also, because of the penalties the defense is not entitled to the right to a jury trial. And when you change a case to a bench trial to a jury trial you're adding an incredible cost to the system. And that's what, I think, really you have to think about as you consider this legislation. Right now you have a lot of assaults. If this

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becomes possible to enhance these to felonies I think you're going to see more assaults, at least in Lancaster County, filed under the city code would now be filed under state statute and more, obviously,...and many would be able to become felonies. There are a lot of defendants who come to court without counsel, plead, and those prior convictions would be used for enhancement now. And I think just, when you talk about more third-degree assaults going to jury trial because of this fear of enhancement, you're going to see more cases. Right now, probably...of criminal cases, probably 2 to 4 percent go to jury trial. So, hardly any. And when you start talking about people being afraid of enhancement, it doesn't take very many cases to now go to trial instead of being settled with a plea to really increase the stress on the jury system, the cost. Any time the charges...now if you have charges filed as felonies, I think we could see in Lancaster County hundreds alone that would be possible to be...I'm talking about third degree assaults, filed in district court, probably need another district court judge. There are going to be more trials certainly because of people being afraid of a felony conviction, the cost. People will sit in jail a much longer period of time and any time the charge becomes more serious a prosecutor is able to request and receive higher bonds. There's much greater pressure on defendants to plead to try and resolve that case and get it over with. And then you're talking about cost to the county in terms of longer pretrial detentions and if you now have prison sentences possible for third degree assaults, you're talking about an increased cost to the state there. Rural areas, everything is a third degree assault. In Lancaster County in the last years...

SENATOR BOURNE: If you could conclude...

JOE NIGRO: I will. I'm sorry. I just wanted to point out this third degree domestic assault law was created. We haven't seen any cases filed under that law. They're still being prosecuted as third degree assault. The statute may sound great but it does put extra burden on the state because they have to prove an additional element. They're still relying on third degree assault. I just really ask you to look at that ability to answer third degree assault. I'd be happy to take questions.

SENATOR BOURNE: Thank you. Questions for Mr. Nigro? So

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you're basically arguing that because the penalties are enhanced, people are going to be less likely to plea and you feel that you'll see an increase in hearings and trials and.

JOE NIGRO: Yes.

SENATOR BOURNE: Okay.

JOE NIGRO: Certainly plus just there's obviously a much greater cost when a case is in district court instead of county court in terms of the amount of time the person will be detained in the jail because of the increased penalties and so I think that's a fairly dramatic shift. And so I would really encourage you to try and assess what that might do to the burden. It's really an unfunded county mandate that you're creating there.

SENATOR BOURNE: Okay. Further questions? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Mr. Nigro, I appreciate your testimony and what you're trying to say here. I mean, obviously, you see a problematic situation here. But Senator Pedersen and a lot of folks on the floor have talked about the people we're afraid of as opposed to the people that we're just mad at. We're afraid of these people.

JOE NIGRO: Sure.

SENATOR FRIEND: And I think, I think if we can...and some of the points you brought here, good ones, I would submit that maybe some recommendations as to how to deal with some of these problems that are real maybe being included in the conversation, just being here at the table, include you in the conversation. But discussing and moving forward with this stuff with, you know, some of the senators and the people that are trying to drive this legislation forward because the fact is, yeah, I mean we heard some testimony the other night about a woman came in. She went home, we didn't know where this predator was. We all leave here, go home to our kids, hug them, and say, you know, what are we going to do about these predators? And then we get bills like this and we all feel good. And then you come in and say, wait a minute, time out. What I'm saying is I would love to continue the discussion but I don't hear a solution.

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I hear problems. And I guess that's what I'm getting at.

JOE NIGRO: Well, and the thing about third degree assault, you're talking about all kinds of assaults. Somebody gets in a scuffle at a bar, obviously, I have a concern that, you know, you get somebody with a \$250 fine for a bar scuffle. And they get in a second one, and now now suddenly they're facing a felony charge. There isn't an easy answer with repeat batterers, obviously. In my experience in Lancaster County, people who do build up a track record of assault are going to get sentenced more harshly within the range of third degree assault.

SENATOR FRIEND: I see what you're saying. The bottom line is, I was hoping that maybe because of this dialogue, we could, you know, Senator Synowiecki brought the bill. We could talk about maybe some things that you think could be enhanced with this bill to help us drive it forward. I would just, I guess, close with that and. Thanks.

JOE NIGRO: Okay.

SENATOR BOURNE: Thank you. Senator Aguilar.

SENATOR AGUILAR: Yeah, I have the same problem to follow up with Senator Friend was going there. You talked about how this could result in longer jail time. Well, I think that's probably part of the answer. I think these people need to be in jail longer. I think a lot of the situations that you're being overwhelmed with in court are because of repetitive situations. Some of the assault cases out here are being repeated over and over because the person merely had his hand slapped. Now, to me the answer to that is, we need to be a little bit tougher. I think what Senator Synowiecki's presenting for us is exactly that answer. And now you're coming and telling us, now we're too busy, we can't do it. I contend that if you're too busy, maybe we ought to put them away the first time instead of keep bringing them back, bringing them back, and bringing them back after they go back home and assault again.

JOE NIGRO: But for these kinds of charges, people...when you're talking about misdemeanor assaults or even if you're talking about felonies that carry zero to five years, people are going to get out. So I represent all kinds of people

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who are repeat offenders of all types of kinds of offenses. They are, I mean, unless you kill somebody or something incredibly serious, they're going to get out. So I don't know that there's an easy answer. I mean, obviously, you can decide you can increase the penalties and take them off the street longer but there are increased costs in trying to do those kinds of things. I think, and I would say to Senator Friend too, when you talk about a lot of the situations that I've heard described here, when you talk about serious assaults where there's serious injury, those people are already being prosecuted for felonies. First degree assault, and they are going to prison for awhile. Now I'm not saying that there aren't people that don't avoid those kinds of things but my focus or I think people are drawn to those kinds of horrific situations. And my fear is that lumped in within that is this enhancement of third degree assault where suddenly you're going to see people on less serious kinds of offenses and a dramatic increase in the cost. And it's not really going to answer the situation you're trying to deal with which is what do you do with a repeat batterer who's really just a very dangerous person? And on those people, I can tell you in Lancaster County, the Lancaster County Attorney's Office, aggressively prosecutes domestic violence and when people commit repeat offenses the sentences do get longer and if they commit an offense resulting in serious bodily injury they're generally going to be dealt with fairly harshly. So I think those kinds of situations are dealt with. I just would urge you to look at the people on the less serious end and how you're suddenly going to group a lot of those people and make those cases into felonies and they're going to be real implications for the justice system. Any other questions?

SENATOR BOURNE: Are there other questions? Mr. Nigro, I just want to say that I think that your type of testimony is what the committee needs and I don't mean to negate the other proponents. But I do think that you are probably after the exact same thing that the introducer of the bill is after. And so we had another bill on domestic violence, and we had a judge that came in and said, hey, I support the concept but in its present form it might not be as workable as the proponents think. And so what I'm saying is, you know, we, as a committee welcome this type of testimony and, hopefully, we can count on you to work with the proponents to do something that helps the situation and, you know, has

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the balance between helping the situation, keeping the batterers off the street, so to speak, and yet, you know, providing some real relief to these people who are abused. So, thank you. I just want you to know you're welcome any time with the committee to offer the commentary.

JOE NIGRO: Well, thank you. I would suggest, I think answers lay in more money for mental health treatment and drug and alcohol treatment but you probably already know that.

SENATOR BOURNE: We do. Further questions? See none. Thank you.

JOE NIGRO: Thank you.

SENATOR BOURNE: Other testifiers in opposition? Testifiers neutral? Senator Synowiecki to close.

SENATOR SYNOWIECKI: Senator Bourne, members of the committee, I just wanted to echo your last remark. I'd be more than willing to sit down with the defense bar relative to this issue. I want to just remind the committee that as it stands now, under the domestic violence assault statutes, a second and subsequent offense is a felony. Now, but one of the problems we're running into is under prosecutorial discretion, some of the prosecutors within the state are still charging on the old assault third degree statute. And in an effort to provide uniformity in statute relative to assault and in the effort to remedy that discretion, that's why this part is put in. But I can assure this committee that is negotiable. I'm more than willing to sit down with the proponents of the bill and with Mr. Nigro to work things out if the committee would allow me to do so.

SENATOR BOURNE: Thank you. Questions for Senator Synowiecki? Seeing none, that will conclude the hearing on LB 535. The committee will stand at ease for ten minutes.

BREAK

SENATOR BOURNE: Before Senator Foley begins his opening, can I have a show of hands of those here to testify in support? I see five. Those in opposition? I see two. Those neutral? I see none. Senator Foley to open on LB 57.

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SENATOR FOLEY: (Exhibit 15) Thank you very much, Senator Bourne and members of the committee. For the record, my name is Mike Foley and I represent District 29 in the Legislature. Last week the Centers for Disease Control included an extensive study on the rate of homicide against women who are pregnant and their findings published in the prestigious American Journal of Public Health corroborated earlier research that found that the rate of violent crime against women who are pregnant exceeds the rate of violence against women who are not pregnant. LB 57 before you today addresses that issue. Over the course of the past 32 years, the U.S. Supreme Court has spoken a number of times on questions associated with the extent to which the states may provide legal protection to unborn children. And the court has consistently used the term, unborn child or unborn children to give recognition to those instances outside of the context of abortion where the unborn could enjoy legal status and rights consistent with those U.S. Supreme Court decisions I offer the legislation before you. LB 57 creates the criminal offense of assault of an unborn child. If a person causes an unborn child to receive serious bodily injury as that term is already defined in our criminal code, he or she could be subject to first, second, or third degree assault charges of an unborn child depending on the facts and circumstances of the case. Introduction of LB 57 is a continuation of recent efforts by our Legislature to protect the life of the unborn child from criminal third party attacks. In February, 2002, the Legislature acted with overwhelming support to enact the Homicide of the Unborn Child Act, a bill that created criminal offenses for homicidal acts causing the death of unborn children. A year later, the legislative body voted unanimously to enact LB 294 which redefined the word, person, to include unborn children for purposes of wrongful death civil actions thus enabling the families of unborn children who die through the wrongful act of another to bring suit to recover damages against the party causing the death. LB 57 before us today is a natural extension of the work that the Legislature has done in the last two years to abide by our state's policy regarding unborn children. As enumerated in our states and I quote, to provide protection for the life of the unborn

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whenever possible, end quote. The legal territory LB 57 covers is by no means new ground as to what other jurisdictions around the country have established. A dozen states or so have enacted some form of fetal assault criminal offenses. Similarly, at the federal level the Unborn Victims of Violence Act sometimes referred to as the Lacy and Connor's Law which President Bush signed into law last year establishes penalties for criminal acts that cause the bodily injury or death of an unborn child. LB 57 seeks to model these legislative efforts in providing additional legal protection to some of our states' most vulnerable individuals from criminal attack. A need for this bill does exist. Since the Homicide of the Unborn Child Act was passed in Nebraska in 2002 there have been three known cases where pregnant women victimized and their unborn children were killed. The legal process is unfolding now in these cases and the killers can be subject to charges of the murder of two individuals. However, if the unborn child in these cases had lived through the attack and suffered serious bodily injury the assailants could not be charged with any kind of crime against the unborn child. LB 57 fixes this deficiency in our law and closes the loophole. LB 57 does not apply to any action taken or conduct by the mother of the unborn child, by a physician or licensed healthcare provider, conducting any medical procedure performed with the consent of the mother or by a person who dispenses or administers a drug or device in accordance with law. Thank you very much, Mr. Chairman. That concludes my opening remarks.

SENATOR BOURNE: Thank you. Are there questions for Senator Foley? Seeing none, thank you. First testifier in support.

GREG SCHLEPPENBACH: (Exhibit 16) Good afternoon, Senator Bourne and members of the Judiciary Committee. My name is Greg Schleppenbach, spelled S-c-h-l-e-p-p-e-n-b-a-c-h. I appear on behalf of the Nebraska Catholic Conference in support of LB 57. The conference is an association of the three Roman Catholic dioceses of Nebraska organized to represent the mutual views and concerns on matters involving public policy. Our position on this bill is that the Legislature should protect all human beings including unborn children, not only within the context of homicide but also within the context of criminal assault. The concept embodied in this bill offers a sound, rational, commonsense

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approach for dealing with current deficiencies and injustices. Nebraska law currently provides no legal recognition or protection for prenatal human beings who sustain nonlethal injuries as a result of nonconsensual violent acts of another, acts typically directed at the woman who carries the unborn child within her womb. The current public policy does recognize and protect unborn children as a matter of criminal law with respect to specifically defined conduct that results in death. This bill is an important, necessary, and logical extension of that public policy to include nonlethal injury. The current deficiency in law in public policy stands in contradiction to justice, compassion, and the official policy of the state of Nebraska as Senator Foley mentioned which is to provide protection for the life of the unborn child whenever possible. Any concerns about the constitutionality of this legislation are unfounded. Protection of the unborn child outside the context of abortion is entirely permissible. The U.S. Supreme Court in Roe v. Wade recognized the state's "important and legitimate interest" in protection of unborn human life throughout pregnancy. Only in the context of abortion did the court hold that this interest must yield to the pregnant woman's desire to terminate her pregnancy. LB 57 does not differentiate on the basis of gestational age and no differentiation need be made nor should be made because to do so would be illogical and merely arbitrary. Medical science provides a reliable and unambiguous indicator of the existence of a separate and unique human being. Issues of causation and proof can be addressed and resolved within the legal process just as it regularly operates regarding other crimes. Since it is constitutionally permissible to protect all unborn children and their families under the criminal assault law, Nebraska should do so. For families who anticipate and welcome their babies from the moment pregnancy is known, the state should not be saying to any such family that the nonlethal serious bodily injury their unborn child has suffered as a result of criminal conduct is any less real or significant an injury to a child already born. The state owes it to society as a whole and to the children and families who suffer very real, intensely human and deeply-felt injustice to fix and enhance its law as proposed by LB 57. Thank you for your consideration.

SENATOR BOURNE: Thank you. Are there questions for

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Mr. Schleppenbach? Seeing none, thank you. Next testifier in support.

DAVE BYDALEK: Chairman Bourne, members of the Judiciary Committee, my name is Dave Bydalek and that's spelled B-y-d-a-l-e-k. I'm the executive director of Family First which is a research and education organization affiliated with Focus on the Family in Colorado Springs and we're dedicated to strengthening Nebraska families. I'm here today to express Family First's support for LB 57. This bill is the logical extension of the criminal fetal homicide and civil homicide bills passed over the last several years. LB 57 also buttresses the stated public policy of the state of Nebraska which is to extend protection to the life of the unborn wherever possible. As set forth in the fetal homicide law, Nebraska's homicide statutes extend protection to the unborn at all stages of development. From a public policy standpoint, we believe it only makes sense to criminalize not only conduct which takes the life of the unborn child but also conduct which causes serious bodily injury to the unborn child. As was the case with the fetal homicide law, the United States Supreme Court's abortion decisions are simply not relevant to a statute which criminalizes the infliction of serious bodily injury to an unborn child without the mother's consent. The decision in Roe v. Wade declares that the state may not protect the potential life of the unborn child when to do so interferes with the mother's constitutional right to an abortion. According to Roe, a woman has a privacy interest in receiving an abortion. However, a defendant that is a third party who assaults the woman causing injury to her unborn child has no such right. As long as the state's interest does not conflict with the woman's right to an abortion the state's interest in protecting the unborn child should prevail. From a technical standpoint, LB 57 is straight forward. To obtain a conviction for first degree assault of an unborn child, a prosecutor must prove that pursuant to the intentional or knowing acts of the defendant an unborn child suffered serious bodily injury. For second degree assault, the prosecutor must show that an unborn child suffered serious bodily injury due to the reckless acts of the defendant utilizing a dangerous instrument. Third degree assault occurs where a defendant recklessly causes serious bodily harm to an unborn child. For these reasons, I respectfully request the committee advance LB 57 to

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General File for consideration by the entire Legislature.
Thanks.

SENATOR BOURNE: Thank you. Are there questions for Mr. Bydalek? Seeing none, thank you.

DAVE BYDALEK: Thanks.

SENATOR BOURNE: Next testifier in support.

AL RISKOWSKI: (Exhibit 17) Yes, my name is Al Riskowski. It's R-i-s-k-o-w-s-k-i with Nebraska Family Council. I appreciate again being able to be here today in regard to this. In our view, to intentionally or knowingly cause serious bodily injury to an unborn child as it's stated in this piece of legislation should be aggressively prosecuted and a punishment should be provided. Nebraska's current statutes do not recognize violent injury to an unborn child. In 2002, as has been stated earlier, of course, Nebraska's Legislature passed the Homicide of an Unborn Child Act and the Assault of an Unborn Child Act will provide consistency and harmony with that provision and with the federal Unborn Victims of Violence Act of 2004. This law does nothing to undermine Roe v. Wade but creates a felony for assault against an unborn child. Unborn children are frequent targets of domestic violence. The child in utero battered by assault deserves the protection of the law just as much as any born infant that suffers child abuse. Even Walter Dellinger of Duke University School of Law, a strong actually abortion proponent agrees that fetal protection laws do not undermine Roe v. Wade. He says, "The legislatures can decide that fetuses are deserving of protection without having to make any judgment that the entity being protected has freestanding constitutional rights. I just think that proposals like this ought to be considered on their own merit. As the father of four children, I recognize the paternal instinct of protecting your spouse is heightened when your wife is pregnant. This is in response to protect the unborn child, the most innocent and precious of life. An assault victim is an assault victim no matter how small. The weakest among us deserved to be protected. And I found a short story here out of Manchester, Connecticut from '99 and Edwin Sandoval attempted to cause the abortion of his pregnant girlfriend's unborn child. He pushed two pills of RU-486 in his

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girlfriend's birth canal. His girlfriend, who did not want an abortion, immediately went to a doctor who removed the pills. The baby boy was born alive in March of '99. Sandoval was charged with assault but in his defense he argued that he could not be charged with assault because the fetus or unborn child was the target of his aggression, not the mother. And presently in Nebraska Sandoval could make a similar defense. So I encourage you to pass this and I agree with President Bush who says, "Pregnant women who have been harmed by violence and their families know that there are two victims, the mother and the unborn child, and both victims should be protected." Thank you.

SENATOR BOURNE: Thank you. Questions for Mr. Riskowski? Seeing none, thank you.

AL RISKOWSKI: Thank you.

SENATOR BOURNE: Next testifier in support?

JULIE SCHMIT-ALBIN: Good afternoon, Mr. Chairman and members of the committee. My name is Julie Schmit-Albin, S-c-h-m-i-t-A-l-b-i-n. I'm executive director of Nebraska Right to Life and we just want to go on record in support of LB 57. We're familiar with a case currently in Omaha where a pregnant woman was assaulted by her boyfriend in the fourth month of the pregnancy. The baby, her baby boy was born in the seventh month as a result of harm that was done to her during this assault. The baby boy was born in the seventh month of gestation last September. He is still hospitalized. He was born with undeveloped lungs at that point and they're not sure what the outcome will be. So there's an example of what this type of legislation would address and we certainly support it and ask for you to pass it on. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Ms. Schmit-Albin? Seeing none, thank you. Next testifier in support. Welcome.

KIMMARIE WOODS: Good afternoon. I'm Kimmarie Woods, W-o-o-d-s. And I'm here with a Litchfield youth group and I come really on behalf of being a mother. And I am a mother of three children. My husband and I, this is the first time I guess I've said this publicly but we were expecting a

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fourth and our fourth baby we did lose at about eleven and a half weeks. And this was an unfortunate thing and it was not due cause to anyone else. But I speak on behalf of mothers that it is very real and the grief is real in losing a baby. And I can't imagine if someone else harms your baby, the emotional trauma that you would go through. And I just speak on behalf of the unborn and the protection of the baby in the womb. And that we should...I am for LB 57 and I just encourage you in that way.

SENATOR BOURNE: Thank you. Appreciate your testimony. Are there questions for Ms. Woods? Seeing none, thank you. Next testifier in support?

ABBY CHAMBERLIN: I am Abby Chamberlin spelled C-h-a-m-b-e-r-l-i-n with the Litchfield youth group. I am here for the...I'm speaking for the unborn children. See, when God made us he meant us to give life to this earth and not take it away. The innocent blood that is being shed and the child who's aborted doesn't even have a chance to take its first breath. It clearly states in the Ten Commandments and in the book of Exodus that we shall not murder and that's what we are doing when we are aborting children. For every two births one baby is aborted. Unborn children are people who have the right to live and while an unborn child is being aborted it can feel pain. An unborn child could have made a big difference. It has its own certain uniqueness and that uniqueness was taken away from everyone who could experience it. That's all I have.

SENATOR BOURNE: Thank you. Are there questions for Ms. Chamberlin? Seeing none, thank you. Appreciate your testimony. Next testifier in support. Oh, people who have testified, have you signed in? Okay, after your testimony you just be sure to sign in for us so that will be part of the record. Thank you. Whenever you're ready.

ETHAN ZOERB: My name is Ethan Zoerb spelled Z-o-e-r-b. I'm from the Litchfield youth group and because of like birth defects that may happen because of an injury while an unborn child is in the womb, kids can come out with serious injury. Like, I have this friend that's in my class. He's in a wheelchair but it's not from abuse or anything but you can end up in a wheelchair...you can get diseases or, just like you can get seriously injured, just you could lose

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something. It's just serious things can happen to an unborn child if they're injured and it's...you can get in trouble for injuring a kid after it's been born. Why can't you get in trouble for injuring one before it's been born? That's all I have to say.

SENATOR BOURNE: Thank you. Questions for Mr. Zoerb? Seeing none, thank you. Further testifiers in support? First testifier in opposition?

BOBBIE KIERSTEAD: (Exhibit 18) Mr. Chairman, members of the committee, thank you for allowing me to be here this afternoon. I'm Bobbie Kierstead, K-i-e-r-s-t-e-a-d, and I'm here representing Planned Parenthood of Nebraska and Council Bluffs. Planned Parenthood was founded on the belief that the ability to make one's own decisions about childbearing including the right to carry a pregnancy to term is among the most fundamental of human rights. That's why I'm here to testify against LB 57. According to a summary of recent studies between 4 and 8 percent of all pregnant women in the U.S. are battered by the men in their lives. A perpetrator who assaults a woman knowing that she's pregnant and intending to interfere with her pregnancy should be subject to criminal prosecution. Planned Parenthood would gladly support legislation to protect pregnant women if that legislation maintained the traditional view of a pregnant woman and her fetus as a single legal entity. LB 57 does not do that. LB 57 expands fetal rights by building upon Senator Foley's earlier bills which began establishing separate legal personhood for fetuses in 2002. When an earlier version of the fetal assault bill was debated in the Unicameral last year, Senator Foley acknowledged this progression to the media, saying that criminalizing fetal assault was "a logical extension" of his previous bills which first established fetuses as separate legal entities. By recognizing the fetus as a person with separate legal rights equal to those of the pregnant woman, LB 57 creates further tension with Roe v. Wade which found in 1973 that the word person as used in the Fourteenth Amendment does not include the unborn. Although supporters claim that bills like LB 57 have nothing to do with freedom of choice, in fact, expanding the right of fetuses has everything to do with it. When fetal personhood was first established in Nebraska by LB 824 the anti-abortion strategy was succinctly outlined in a Lincoln Journal Star editorial stating,

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"Pro-life supporters have long believed that if they could demonstrate that a fetus is a human person it wouldn't be long before the courts and legislatures declared abortion unjustified homicide. Any acknowledgement in state law of fetal rights obviously would be the basis of future arguments to restrict abortion. Make no mistake about it, LB 57 is part of a step-by-step back-door program to eliminate safe, legal abortion in Nebraska. Planned Parenthood is sensitive to the unique and physical and emotional injury suffered by a pregnant woman who is assaulted. The best laws addressing this issue recognize the woman and her fetus as one person and employ enhanced sentencing when a pregnant woman is assaulted. There is no question that pregnant women deserve protection. However, she should not have to trade her right to terminate an unwanted pregnancy for protection from assault when she chooses to carry a pregnancy to term. I urge the committee to oppose LB 57 and if I just might, I would further encourage you to seek out alternative legislative models that would protect pregnant women from assault while maintaining a traditional legal view that a woman and her fetus are a single legal entity. Thank you.

SENATOR BOURNE: Thank you. Are there questions for Ms. Kierstead? Seeing none, thank you.

BOBBIE KIERSTEAD: Thank you.

SENATOR BOURNE: Next testifier in opposition?

TIM BUTZ: (Exhibit 19) Good afternoon, Senator Bourne, members of the committee. My name is Tim Butz, B-u-t-z, executive director ACLU Nebraska. I think we have to define that there's some common ground here between the proponents and opponents. Nobody is here today saying that violence against pregnant women should go unpunished. The question is, what is the model that we're going to use in order to affect that common goal? And we believe that rather than creating a separate legal right that attaches to the fetus the proper way to do it is through sentence enhancements. Sentence enhancements were discussed in a prior hearing. You're all familiar with the concept. We think it's an appropriate means of achieving the goal. Penalty enhancements focus the criminal law where it should be on the additional and often devastating injury that a woman

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faces when a crime harms her fetus. And there's about 30 states so far that have statutes similar to Senator Foley's. Let's be honest about it. Where they treat the fetus as an independent victim and those states vary greatly where they define the point of protection of the law. And the proposal by Senator Foley, it treats it at any stage of gestation, in other words, at the moment of conception. Other laws move it further down the road where the fetus is able to move in the uterus and still others treat it only as a crime if the fetus is viable. One of our concerns about this bill is that in only one of the four crimes that would be created under it does there have to be knowledge of pregnancy. And that's where the crime of assault on an unborn child in the first degree. All the other categories do not require any recognition or any knowledge that the unborn child or the fetus is present or that the woman is pregnant. We think there's a problem there with establishing some intent but going back, as time runs out, going back I think that Ms. Kierstead was accurate when she was talking about this being kind of a back-door attempt to erode rights that are secured under Roe v. Wade. This legislative body as a whole may not like the concept of a woman's right to choose. It may not like abortion but you cannot undo the Roe v. Wade decision. If we really want to protect pregnant women from violence we should be putting resources, money, laws, and attention into domestic violence prevention programs. We should be reinforcing those things that work to reduce violence against violent women and we should use penalty enhancements to put in jail for a long time those who would harm pregnant women and do damage to them and their families. And with that, I'll take any questions you might have.

SENATOR BOURNE: Thank you. Questions for Mr. Butz? Senator Friend.

SENATOR FRIEND: Thank you, Senator Bourne. Mr. Butz, good to see you again.

TIM BUTZ: Um-hum.

SENATOR FRIEND: I...with all due respect you brought up the knowledge, the knowledge piece and the lack of knowledge in the assault situation. I don't think that's a horse I would ride for very long because I think it's a losing horse and

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I'll tell you why. I mean, and I would ask you for your observation after this. If I'm running down this hall waving a baseball bat and I hit you on the top of the head even if it's an accident, I can be nailed for an assault. I guess I'm just telling you I think that that's a losing...your other points, I guess, understandable and debatable. I'm, in a friendly way, I wouldn't tell you to go around promoting that one because I think that's a losing...

TIM BUTZ: Well, you know, it's...

SENATOR FRIEND: ...I got into that with Ernie on the floor last year, Senator Chambers. And I just think it's a losing argument.

TIM BUTZ: See, I think it's hard to define something as a crime when there's no knowledge of an element of the crime. How can I be guilty of assaulting "an unborn child" if I don't know that there is actually an unborn child there. This bill would...

SENATOR FRIEND: Well, Mr. Butz, I mean I enjoy waving baseball bats. I had no knowledge or idea that I would end up hitting you on the top of the head but I assaulted you. I mean, I...

TIM BUTZ: There's really a difference, Senator...

SENATOR FRIEND: Well,...

TIM BUTZ: ...when you wave a baseball bat you know someone or something...

SENATOR FRIEND: My kid waves...

TIM BUTZ: ...could get hit and...

SENATOR FRIEND: Yeah, well,...

TIM BUTZ: ...and you've probably been bonked by your kid as many times as I have.

SENATOR FRIEND: I'm pretty accurate with my baseball bat.

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TIM BUTZ: Well, (laugh) remind me not to play catcher for you.

SENATOR FRIEND: I was a baseball player, I was a baseball player. No, no, anyway, I'm just saying...thank you for your testimony and I understand your points. And I would...that's really all I'd have so I just...

SENATOR BOURNE: Thank you.

SENATOR FRIEND: Thanks.

SENATOR BOURNE: Further questions? Senator Foley.

SENATOR FOLEY: Mr. Butz, thank you for your testimony. I found it to be very direct and clear. I appreciate that. If a drunk driver crashes into another vehicle, an infant child strapped into a car seat suffers permanent brain damage as a result of that drunk driving incident, could the drunk be prosecuted successfully for the brain damage to the child or could he claim, your honor, I didn't know there was a little baby in that car.

TIM BUTZ: Well, the state has already said that when you operate a motor vehicle in a drunken manner impaired by drugs you're going to be held liable for any damage that occurs. I mean, that's well-established law and, in fact, in your bill, you know, that's one of the four changes in Nebraska law is that it changes the drunk driving laws to include the assault of an unborn child is a Class III felony for drunk and drug-impaired drivers. So I think that there's a little different approach to drunk driving than there is to assault. Every assault needs to be punished. I don't want anybody to misunderstand what I'm trying to say here today. I'm not saying that people that go around smacking women deserve to walk down the street a free man the next day. They deserve to be locked up and you heard lots of testimony about that in the hearing before this one. I think there is a problem, though, in creating a separate crime where the person, if they had knowledge of the pregnancy, might act differently, might restrain themselves, might not assault. I think you have to be careful how you create liability for criminal action. It just seems to me that there's a fault here or a flaw with the idea of intent. And I don't know, you know, other than...

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SENATOR FOLEY: You've hinged your argument on this knowledge question, though, but we have existing law that's been on our books for decades and decades that provides for criminal sanctions for people who cause injuries despite lack of knowledge.

TIM BUTZ: And, Senator, again, I think that when it comes to your bill the fact that you're creating a crime that creates a...or you're creating a law that creates a new victim, deserves some consideration of how people know there is a second victim. You know, if I'm going to hit twins that are running through my front lawn I know I'm slapping two kids. If I'm a jerk and I want to slap a woman that's walking across my front lawn I might hit her if she's just walking across the lawn. I might see she's pregnant and say no. I mean, there's...I know you don't like this idea that we think there has to be some intent here. I don't know that we need to beat that difference to death but...

SENATOR FOLEY: So if a man attacks a pregnant woman and the unborn child, later born, is diagnosed with permanent brain damage your solution is a little extra penalty above and beyond what we would ordinarily...

TIM BUTZ: An enhanced sentence.

SENATOR FOLEY: ...a little extra.

TIM BUTZ: I don't say a little. I would say an enhanced sentence and it would be up to the Legislature to determine whether that sentence enhancement...or how severe that sentence enhancement should be.

SENATOR FOLEY: So enhance the sentence to recognize that something else, somebody else...

TIM BUTZ: Something else has happened here.

SENATOR FOLEY: ...something, just something else has happened, not someone else was injured.

TIM BUTZ: I think that, you know, Senator, I'm not going to try and play a game with you here. I think your bill says what it says and I think that everybody in this room knows

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that this bill is part of a pattern of bills that you've brought about trying to create separate rights for fetuses. And that separation of the fetus from the mother undercuts the legal arguments that go to Roe v. Wade. And you shouldn't be ashamed of that. I mean, those are your honest, well-held beliefs and I respect people that are articulate advocates for their beliefs but let's not try and paint this as anything other than it is. We see that move of creating separate rights for fetuses as dangerous and in the area of reproductive freedom. You see it as necessary to advance your political goal. It will be up to the members of this committee and perhaps the Legislature as a whole to tell us who is right and who is wrong.

SENATOR FOLEY: There are...you've acknowledged in your testimony that there are thirty-some states that have...

TIM BUTZ: Right.

SENATOR FOLEY: ...fetal homicide, fetal assault or some combination thereof.

TIM BUTZ: Yes.

SENATOR FOLEY: And these laws have been litigated and challenged and never successfully, though.

TIM BUTZ: That doesn't make them right, Senator.

SENATOR FOLEY: So you think they're wrong philosophically. You don't think they're wrong constitutionally.

TIM BUTZ: I think they're wrong philosophically. They're bad public policy and I think that in the end they're designed to forge a right, new right that will come in conflict...

SENATOR FOLEY: But you stop...

TIM BUTZ: ...with Roe v. Wade...

SENATOR FOLEY: But you stop short, you don't question the constitutionality of those thirty-some...

TIM BUTZ: I think that in the end the constitutionality of

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them will be decided by people other than you or I. And I'm not...you know, I told you earlier at another hearing...

SENATOR FOLEY: Well, but that you mean...

TIM BUTZ: ...I'm not threatening lawsuits when I come here but...

SENATOR FOLEY: by that you mean you mean federal courts.

TIM BUTZ: Pardon?

SENATOR FOLEY: By that you mean federal courts, I presume and the federal courts...

TIM BUTZ: I think that at some...a smart defense attorney is going to try and find a constitutional flaw in this. They would not be doing their job if they didn't.

SENATOR FOLEY: But these laws have been on the books for decades in some states and they've never been successfully challenged.

TIM BUTZ: Well, I don't know that they've been challenged, period. And maybe you do but I don't. And I'm not saying that a challenge will arise here in Nebraska. I'm saying we have a serious philosophical difference between those who support the concepts contained in Roe v. Wade and those that would seek to destroy Roe v. Wade by going through the back door and establishing special rights and special standing in the law for a fetus.

SENATOR FOLEY: Thank you.

TIM BUTZ: Thank you, sir.

SENATOR BOURNE: Further questions? Senator Aguilar.

SENATOR AGUILAR: Mr. Butz, I'm going to give you a little scenario and ask for your observation, okay?

TIM BUTZ: Okay.

SENATOR AGUILAR: Now, while you were having a discourse with Senator Foley, you talked about intent and knowledge.

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In other words, a person might not know the woman was pregnant, had no knowledge, and certainly had no intent of hurting the fetus, correct?

TIM BUTZ: Um-hum, correct.

SENATOR AGUILAR: Okay, let's say Senator Friend is assaulting his wife and is getting rather physical (laughter).

TIM BUTZ: I don't know Senator Friend real well but I doubt he'd do that (laughter).

SENATOR AGUILAR: He's doing this. Trust me (laughter). And their one-year-old son comes running out of the bedroom and tries to help his mom and in the scuffle they fall over, fall on the child, break the child's leg. Now chances are, Senator Friend's going to be charged with assault for breaking that child's leg although he had no knowledge that that child was going to be there and come running out. He certainly had no intent of hurting that child. I guess I'd be curious to know, what's the difference between that scenario and that scenario?

TIM BUTZ: That child is protected under existing laws. That's not a fetus. What we're talking about here are fetal rights which are different from the rights that people enjoy once they're born. The Supreme Court has recognized that and we see this again as a back door to undercut Roe v. Wade. If Senator Friend was to, or if I was to behave in the way that you cited, I would expect that the police would take great joy in arresting us and they should. But you're talking about a person who has been born and has standing under the law as opposed to a fetus which does not enjoy the same rights.

SENATOR AGUILAR: Okay. Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

TIM BUTZ: Thank you.

SENATOR BOURNE: Other testifiers in opposition? Are there any neutral testifiers? Senator Foley waives closing. That will conclude the hearing on LB 57. Senator Friend to open

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LB 116

on LB 116.

LB 116

SENATOR FRIEND: Thank you, Chairman Bourne and members of the Judiciary Committee. My name is Mike Friend, F-r-i-e-n-d. I represent the 10th Legislative District in northwest Omaha. I'm here to introduce and request for your support LB 116 and the bill I'm introducing at the request of a resident of Omaha, acquaintance of mine. LB 116 allows the court to sanction an employer or other payor is the way the language goes in the laws, in the current law, for failing to withhold and remit the income of a person obligated to comply with a court order. The language, as you can see, is permissive in nature. Although most employers and what we're getting at here is most employers respect garnishment orders for child support. It has come to my attention on various occasions with constituents and other instances that some employers, for whatever reason, have not or don't satisfy those support orders. And those bad apples, I guess you would call them if you want, if you will, are the reason I bring an offer, LB 116. You'll hear with a little bit of subsequent testimony, our state has custodial parents who are struggling financially to make ends meet. We all know that. And because child support payments are not being withheld and remitted by some employers of noncustodial parents. These employers are, in our view, disrespecting both our courts and the children for whom they have been issued a garnishment order. Some states in the Midwest, Iowa, North Dakota, Missouri, as examples, hold employers liable for the amount of unpaid support due in addition to possible fines or court costs. LB 116 doesn't do that. The bill merely seeks to impose a \$25 per day penalty for up to \$500 per incident on an employer who fails to comply with the garnishment order. It addresses a void, we think, in the statutes and perhaps possibly might be the financial incentive really needed to gain compliance from the aforementioned employers. I would just say thank you, would ask for your support respectfully for LB 116.

SENATOR BOURNE: Thank you. Questions for Senator Friend?
Senator Pedersen.

SENATOR Dw. PEDERSEN: Thank you, Senator Bourne. Senator

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Friend, how come you decided to go for a fine and not for the reimbursement of what they didn't hold.

SENATOR FRIEND: It's a good question. I think we looked at the situation. As a matter of fact, just to be clear, we studied this or just to get the information to you. We studied this through the interim and we took a long time. We looked at a lot of different laws. We looked, like I said, at North Dakota's, Missouri's, Iowa's. The reason that I think that we didn't do that, we wanted to make this real simple. We wanted to make it as simple as possible and as quick as possible because we felt it's more efficient this way, more equitable this way and less potential for combative...we weren't looking to punish anybody, I guess, is what I'm saying, Senator Pedersen. We were looking to just come up with some compliance, okay? And to me, in some ways, what you're talking about may be a little bit of, you know, may be a punitive measure. Maybe we can. I'm just saying (laugh), part of the reason we wanted to make it quick, equitable, and we were looking for some compliance. That's all. And I hope that answers the question. I...

SENATOR DW. PEDERSEN: Thank you.

SENATOR FRIEND: We were looking for some efficiency.

SENATOR BOURNE: Thank you. Further questions for Senator Friend? Senator Friend, is there, you know, several years ago the federal governments came out and they said there had to be a mechanism to centrally collect child support. And is there anything in the federal rules that deal with this issue as it relates to the employer?

SENATOR FRIEND: That's, obviously,...and I should have expected it coming from you, a question that is a good one, and I don't have the answer to. I've heard...and part of the research that we did or most of the research we did, we didn't go down that road...

SENATOR BOURNE: I think this...

SENATOR FRIEND: I discussed it with the treasurer's office briefly. As you can see, I submitted or distributed a letter from the state treasurer's office. Frankly, Senator Bourne, I don't know the answer to that.

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SENATOR BOURNE: Your bill is broader than just child support. It'd be garnishment or anything. Is that accurate?

SENATOR FRIEND: Well, the...

SENATOR BOURNE: Anything that the employer would have an obligation to withhold?

SENATOR FRIEND: Well, it falls under Article 17, Income Withholding for Child Support Act. So I mean the, I think the answer to that question is, would be no. It does specifically address...and but I can correct the record if that's not true. But I've got under 43-1709 employer or other payor under Article 17 of Chapter 43, infants and juveniles, Nebraska Revised Statutes in 19...I mean, so I think the answer is no to your question but...

SENATOR BOURNE: All right. Thank you. Further questions? Seeing none, thank you.

SENATOR FRIEND: Thank you.

SENATOR BOURNE: First testifier in support? Welcome.

MICHELLE PITMAN: (Exhibit 21) My name is Michelle Pitman, M-i-c-h-e-l-l-e P-i-t-m-a-n. I'm a resident of Omaha, Douglas County, Nebraska. Judicial Committee members, Senators and citizens, good afternoon and thank you for your interest in this cause. I have been divorced now for five years. The collection of my support has been a very difficult task. I have called the Child Support Enforcement Office on many occasions and I have been told there is nothing that they can do to employers that do not garnish wages in this state. Over the years, I have been told by the county attorney's office in Douglas County they are not able to enforce the current statute due to its lack of language. I have also been told that the employer does not receive any type of punishment nor do they have to pay any of the costs incurred by enforcing the statute that's currently in place. Hence, the county attorney's office will not file any charges against an employer that does not garnish their employees' wages according to the law. Currently, my daughter's father, the obligator, is behind in

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his support. The obligator's father currently employs him in the construction industry. I do know he receives a paycheck every two weeks. My support is currently \$355.04 per month. However, I am lucky to receive only \$200 per month. When the obligator gets far enough in arrears to have his license suspended, his father's company will send a larger check to prolong the suspension. This delinquency is the reason I am here before you today. I have completed extensive research regarding this issue. My research is within the 8th Circuit and our neighboring states as well. I have sent a copy to either all of you with regards to the research for your review. LB 116 will not only benefit myself but many other custodial parents across the state. This bill will also benefit the Nebraska Department of Health and Human Services in the process of collecting child support and the Nebraska Department of Treasury that oversees the collection of payment of the child support. I would like to thank you for your time and consideration in this matter, and I also look forward to your decision as well.

SENATOR BOURNE: Thank you. Are there questions for Ms. Pitman? Senator Flood.

SENATOR FLOOD: Ms. Pitman, thank you very much for taking the time to testify. I didn't realize there wasn't a law on the books that would force the employer to pay or face sanctions. Have you ever looked into or had anybody file an action on your behalf that would take the driver's license of your ex-spouse or the father of the children for nonpayment of child support?

MICHELLE PITMAN: According to my testimony, Senator Floyd (sic), as I had stated, the current statute on the driver license suspension is three months plus one penny in arrears of child support and currently my ex-husband's employer waits till that gets to that point and a few days prior to the suspension will send in a large check to prolong the suspension.

SENATOR FLOOD: So they have full knowledge of how this operates and they take advantage of it. And it's your impression that they're kind of milking the system to get around that little loophole. Is that right?

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MICHELLE PITMAN: Correct. If you obtained copies of our docket and page in Douglas County Court for the last five years of support, you would see the pattern that has developed over the years with regards to the payment history.

SENATOR FLOOD: How far in arrears is he now?

MICHELLE PITMAN: Currently as of today's date, he is \$1,400 in arrears. However, the way the statutes are written on support, support is due on the first but not delinquent until the following first. So as of April 1, he would be eligible if he does not pay between now and April 1, he would be eligible for license suspension.

SENATOR FLOOD: Have you considered a civil contempt action against him to notify the judge of his pattern of behavior and asked for sanctions such as jail time, contempt of court, jail time for his behavior?

MICHELLE PITMAN: On two separate occasions, approximately four years ago, I hired an attorney, paid the court costs, and filing fees to have the contempt charges brought against my ex-husband. And two days before the trial, the employer made a payment and the judge stated that that was a good enough attempt to make payments and dismissed the case. On another occasion, there was an action brought against him with regards to contempt. The judge did find him in contempt and, at that point, the employer did pay for nine months in accordance to the statute. After the contempt order was listed, it was back to sending whatever they felt like sending.

SENATOR FLOOD: So they're really just playing with you, is that...I mean, it seems like they're just messing around with you.

MICHELLE PITMAN: Yes. And I know that I am not the only person out there that has experienced this as well.

SENATOR FLOOD: Well, I can understand why you're mad. You've tried everything and it's not working and I appreciate your coming today.

MICHELLE PITMAN: Thank you.

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SENATOR BOURNE: Further questions for Ms. Pitman? Seeing none, thank you. Appreciate your testimony. Next testifier in support? Are there any testifiers in opposition? Are there any neutral testifiers? Senator Friend waives closing. That will conclude the hearing on LB 116.

SENATOR Dw. PEDERSEN: We will now open the hearing on LB 609. Here to introduce the bill is Senator Bourne. Whenever you're ready, Senator Bourne.

LB 609

SENATOR BOURNE: Thank you, Senator Pedersen. Members of the Judiciary Committee, my name is Pat Bourne. I represent the 8th Legislative District in Omaha, here today to introduce LB 609. LB 609 would take the cost of air bag replacement out of total loss calculations for purposes of totalling a vehicle. Under Nebraska law, a vehicle must be salvage if the cost to repair that vehicle exceeds 75 percent of its market value at the time it was damaged. Air bag replacement can often add several thousands of dollars to the cost of a repair and usually will force the cost past the 75 percent level thus resulting in the car being totalled. This becomes more relevant today because we are seeing more instances of a car being totalled while the owner is still paying off the loan used to purchase that car. Many people are finding themselves in a situation where their car is in a fender bender. The air bag deploys and the car is totalled. Because cars depreciate quickly, they may still be making payments on that car and the insurance check doesn't cover those payments. In reality, it may have been less costly for that person and for the insurance company to repair the vehicle but the carrier is prevented by statute from authorizing the repair. LB 609 also excludes car stereos and tires from total loss calculations. Car stereos are not an essential component for a vehicle's operation and can be customized, making them costly to replace. Tires can be customized as well. Our bill drafting office believed that for the sake of consistency, some of the provisions should also apply to total loss calculations for motor boats and all-terrain vehicles so those are addressed in the bill as well. I did not intend for there to be a situation where a deployed

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air bag is not reinstalled in a repaired vehicle. After discussing this bill with members of the insurance industry, I believe that we could accomplish the goal of LB 609 by simply adjusting the 75 percent threshold. I'll leave that to your discretion. I believe that LB 609 would benefit car owners, insurance companies, and the motor vehicle repair shops, and I urge you to give consideration to LB 609. Thank you.

SENATOR DW. PEDERSEN: Thank you, Senator Bourne. Is there any questions from the committee? Seeing none. Can I sample the audience, those in attendance here. How many people are in favor of the bill? I count five. Is there opposition? See none. Thank you. Would the first testifier please come forward and Senator Bourne, I'll return the committee back to you. (See also Exhibit 22)

SENATOR BOURNE: Thank you. Welcome.

NORBERT ZAENGLEIN: Thank you. Senator Bourne, members of the Judiciary Committee, my name is Norbert Zaenglein and I'm the executive director of the Nebraska Auto Body Association. And I'm here to support LB 609.

SENATOR BOURNE: Could you spell your last name for us?

NORBERT ZAENGLEIN: Sure, it's Z-a-e-n-g-l-e-i-n. The Nebraska collision repair industry represents an important part of our state's economy generating sales of new and used collision parts, sheet metal, paint, primers, and auto body supplies. The collision repair industry also generates substantial tax revenue and employment for Nebraskans. Yet the collision repair industry has been suffering a recession and a number of shops are closing and have closed. The number of collision repair jobs are declining for several reasons. Modern vehicles are complex and easily totalled. Advances such as antilock brakes, traction control, computerization, and advanced inflatable safety restraints such as front and side curtain air bags have increased the cost of repair putting many vehicles over the existing total loss threshold. This translates into fewer repair jobs, fewer sales, fewer jobs for technicians, and fewer choices for consumers who may want to have their cars repaired rather than totalled. LB 609 would benefit all parties by increasing the number of vehicles that would otherwise be

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salvaged. Exempting inflatable safety restraints, tires, sound systems from total loss calculations would put Nebraskans to work. Instead of sending a perfectly good vehicle to the salvage yard it would be repaired. Dealers would sell parts. Paint companies would sell paint. Technicians would be put to work. It's a win-win situation for everyone including Nebraska. Dun and Bradstreet classifies the collision repair industry in the manufacturing sector. And passage of LB 619 would be like bringing a new manufacturing sector to the state of Nebraska. The infrastructure is already in place and this would simply fuel the number of jobs and the number of sales. So on behalf of the Nebraska Auto Body Association, I'd like to encourage you to support LB 609.

SENATOR BOURNE: Thank you. Are there questions? Senator Foley.

SENATOR FOLEY: I'm trying to understand this bill. Fewer cars would be totalled so the insurance companies would be required then to cover the cost of repair of more vehicles than they are today. Is that right?

NORBERT ZAENGLEIN: Yes.

SENATOR FOLEY: If this bill passes. Yet they're not in here in opposition to the bill.

NORBERT ZAENGLEIN: Well, I think if you take the total loss threshold, I mean they're going to total the car. They're going to, you know, pay whatever the book value of the car is and I know you have members of the insurance industry here so they can probably, you know, address that as well. But, you know, my understanding is if you have a car that has a value of \$10,000 and it has a total loss threshold of \$7,500 that market value of \$10,000 to pay the total loss would still take more from the insurance industry than it would to pay out \$9,500 in repair costs. So there would still be a net savings.

SENATOR FOLEY: Would passage of this bill make our laws in this area unique?

NORBERT ZAENGLEIN: No. They just had...Missouri just passed a similar law and the statistics I have read from the

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Missouri Department of Insurance said there were significantly fewer totalled vehicles in that state as a result so no, we're not alone in introducing such legislation.

SENATOR FOLEY: You mentioned one state, Missouri. Are there other states that you're aware of?

NORBERT ZAENGLEIN: I am...there may be, but I'm not aware of them.

SENATOR FOLEY: Thank you.

SENATOR BOURNE: Further questions? Seeing none, thank you.

NORBERT ZAENGLEIN: Thank you.

SENATOR BOURNE: Appreciate your testimony. Next testifier in support?

GREG PETERSEN: Members of the committee, thank you for your time today. My name is Greg Petersen, P-e-t-e-r-s-e-n. I own several collision repair shops in Omaha and Lincoln, and I'm testifying in favor of this bill. Since the original salvage bill law came into effect we've seen a significant decrease in the number of repairable vehicles out there. A lot of it is due to the...since 1996 motor vehicles, passenger motor vehicles in the United States have been required to have dual air bags. Since that time, the cost of replacing those air bags have gone up at least twice because you have two of them now and the passenger side is often much more expensive than the driver side. We're in favor of it being exempted from that because a lot of times some of these vehicles are not structurally damaged enough to be considered a total loss but the cost of these parts are pushing them over the edge. One mention I'd like to make about the language in there is it doesn't address some of the other associated parts with replacing air bags. The language in the bill just mentions the inflatable restraints themselves. There's also oftentimes sensors, dash parts, and clock springs, some other things like that are involved too and that would need to be...I think that needs to be added to the calculation. I have no further.

SENATOR BOURNE: Thank you. Are there questions?

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Mr. Petersen, are there...oftentimes when a car is repaired, either the individual repairing it or the insurance company will specify what they call aftermarket parts. Rather than buying a fender from GM you buy one from whoever the manufacturer may be but a nonmanufacturer. It's what they call LKQ, I guess like kind and quality. Are there aftermarket companies that make air bags and air bag components?

GREG PETERSEN: There's some companies that are trying to do that. At least in the United States the insurance companies...there isn't an insurance company that I know of that will allow those to be used. They're only requiring OEM or original equipment manufacturing parts to do that. One thing I did forget to mention is because of the 75 percent that's written into the bill, that doesn't...a lot of times insurance companies used to go to maybe 80, 85, 90 percent depending on the customer's circumstances, the type of vehicle, and so on and so forth. Because of the language in here now they're not allowed to do that. The consumer has no negotiation on that part. We're seeing insurance companies total vehicles at 65 percent because they're afraid they might go to 75 with the final bill.

SENATOR BOURNE: Because of hidden damage perhaps?

GREG PETERSEN: Hidden damage, oftentimes transmission or electronic components. But some of them are so skittish about, you know, and the liability associated with hitting that 75 percent they're not going any farther.

SENATOR BOURNE: Further questions? Let me, just for clarity and if you don't know the answer, that's fine. But the previous testifier mentioned a car that's worth \$10,000 and the \$7,500 threshold. Is the \$7,500 simply the cost of repairs or does that include the amount that the insurance company would receive for the salvaged vehicle if they purchased it from the owner?

GREG PETERSEN: Depending on the insurance company, all of them use just a little bit different formulas. But it used to be kind of a rule of thumb that an insurance company could get approximately 20 to 25 percent of the value of a vehicle at the salvage auctions or a contract. For a lot of

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reasons that's no longer there anymore so before this law was ever in place the rule of thumb was about 75 percent. And then if the vehicle hit that, they would go out and see what they could get for bids. If they could get anything for the car then they might raise the price up a little bit, work with the owner, and so on. So to answer your question, it doesn't really matter what the...the insurance company is only going to pay out \$10,000 to the customer. They're hoping to get back some from salvage when they sell the vehicle off. That gap has narrowed quite a bit. It's no longer...they're no longer getting 20 or 25 percent.

SENATOR BOURNE: Thank you. Further questions? Seeing none, thanks, appreciate your testimony.

GREG PETERSEN: Thank you.

SENATOR BOURNE: Next testifier in support?

MIKE VARNEY: Senator Bourne, members of the committee, I'm Mike Varney. That's V-a-r-n-e-y and I'm with Farmers Insurance Group. And I'll start by just solidifying the issue you both raised about how a total loss is determined. Prior to this law being in place, the standard in the insurance industry was we would look at a vehicle. If it was...and we'd look at the cost of repair, and if we took that cost of repair and added to that what we could expect to be salvage we could get if we were to total out that car and sell that salvage. If those two figures added together exceeded the value of the vehicle we would in normal situations total out that vehicle. Now there are a lot of things that come into play even in this day and age where it's sometimes because salvage is not nearly as big a business as it used to be as a previous testimony states. We used to be able to get 20 percent even on the newer cars especially but we're at a point now where we make very little on salvage. And the way that claims are being settled now, take that scenario of \$10,000 in value with a repair of \$7,500 we might get \$1,000 in salvage meaning that we're taking a hit of about \$1,500 and that's happening time and time again. That's just affecting us. More importantly, it's affecting the consumer because they're feeling that they have less flexibility in getting their cars repaired and few folks realize that we have a lot of insureds who would rather see their car repaired than to

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have to go through the hassle of finding another car to replace it but this law has kind of tied their hands especially if they start to walk down the path of owner retained which in this particular...the present statute, there's still a problem in them having to get it salvaged, titled, and having to do so in 30 days. It just becomes kind of a convoluted mess. In my review of the bill and I talked with you, Senator Bourne, a number of times on our interest in trying to deal with this. I wanted to deal with the situation because I realized our customers were having a big problem here. Our body shops were having a big problem and it's kind of taken a number of different steps as we go along the way. We looked at, especially the big cost of air bags and the associated costs with that being a big part of the cost to repair which is bumping us up to that 75 percent quite quickly. As further discussion has taken place, we've talked about that whole 75 percent issue to begin with and how it's kind of an arbitrary number, might have made sense in the past when we were getting 25 percent salvage but we no longer do that. So we're looking at possibly removing that altogether and just going back to if the insurance company determines it's a total loss and it's less than seven years of age that in most cases it would be salvage title that would kind of simplify the issue while giving us kind of a middle ground and flexibility to satisfy our customers and repair their vehicles when they wish. As I've researched further, I'm finding that it's possible that the present statute may actually allow us to do just what I wanted to propose. And if I may go on. In Statute 60-129 it states that when an insurance company acquires a salvage vehicle through payment of a total loss settlement on account of damage, it goes on to say we have to get a salvage title. As an industry and the body shops as well, we've been focusing on the definition of salvage vehicle which is where it states that 75 percent is important. But if I read it again, it says that when an insurance company acquires a salvage vehicle through payment of a total loss settlement I'm reading that it could be interpreted as though we don't even have to go down that path of the salvage vehicle titling unless the insurance carrier determines it to be a total loss. And if that's the case, we can determine it to be a total loss whether it's 75 percent repair, 85 percent repair. And it may be that seeking clarification from the DMV may help us in that regard and not necessarily maybe have to go down the road of

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changing the present statute. But there's a lot of confusion in the industry right now and it's leading toward a lot of our consumers not being too happy. The other thing, too, is that getting back to the owner retain salvage that reading the statute verbatim is it can be confusing as to whether or not the owner can have the same benefit in that it has to be a total loss determined by the insurer. It states that if the owner elects to retain the salvage vehicle as defined in the statute the insurance company shall notify the department of that fact in a format prescribed by the department. In effect, what we have to do is we have to advise the consumer that they've got 30 days to get that salvage title branded. We notify the DMV that we've done so. They flag that particular title and wait those 30 days for somebody to come along and finally get a salvage title. In effect, my understanding is they're just waiting for that title to possibly be processed somewhere down the road. They're not really enforcing the 30 days. The question that comes to mind is whether or not the owner retained person or that basic consumer out there is only under this type of requirement if the insurance company determines it a total loss or not. And in reading the DMV's clarification on that, it leads us to believe that they would benefit as well, that we don't have to go down this path to salvage unless it's determined to be a total loss by the insurance company. If we could get that clarified by the DMV, I believe we might not even have to deal with the statute in whole. So I've kind of gone 180 on the whole thing, but I wanted to bring you up to date on it.

SENATOR BOURNE: Appreciate that. Questions?

MIKE VARNEY: I'm available for questions.

SENATOR BOURNE: Questions for Mr. Varney? So the 75 percent of value was put in, as I understand it, was 2002 and before that the insurance carriers, the property casualty carriers had discretion to...if somebody had a car they really liked and, you know, you could go up to...I guess it would make sense to go up to 99 percent, wouldn't it, of...?

MIKE VARNEY: Yeah. If we can get salvage that would allow us to constructively total it out and a lot of cases we're getting above 90 percent of the value they will repair it.

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SENATOR BOURNE: But since that law was put in place and again the 75 percent was an arbitrary number, your industry has been under the impression that that's the absolute. We had a previous testifier, if it gets close to the 75 percent and it's damaged badly enough that you can't see the transmission case or something, you'll walk away from it and salvage that car. So you have seen an increase in the number of cars that your industry is totalling?

MIKE VARNEY: Absolutely.

SENATOR BOURNE: Have you seen an increase then and here's my concern. It's more along the consumer than it is...I don't mean to...I'm not criticizing your industry or the auto body industry but my concern is is those car owners who are in a car accident, no fault of their own. They have a \$10,000 car that they owe \$4,000 or \$5,000 on which isn't unusual anymore and well, the numbers are probably even greater than that. So you're going to give them \$10,000. They're going to net \$4,000-\$5,000 maybe and then go out and have to buy a new car as well. Have you seen an increase of customers having cars totalled where they still owe money?

MIKE VARNEY: Oh, absolutely. In fact, where they've used it as collateral on loans other than an auto loan and it gets totalled out and they're upside down in their loan meaning they're going to get an amount from us that's less than what they owe on the vehicle and I know the DMV is seeing those types of situations too increasing.

SENATOR BOURNE: You're seeing it actually where they owe \$15,000 on a \$10,000 car and so you're going to give them the \$10,000 and...is that what...?

MIKE VARNEY: Yeah, we give them whatever the value of the vehicle is and if they've got a loan that's greater than that, that's unfortunate but.

SENATOR BOURNE: If we can't obtain clarification from the DMV and we decide, again, as I mentioned in my opening and based on discussions with you that maybe we just need to adjust that number or take it away. I mean, will that solve the problem?

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MIKE VARNEY: I think that it would. It would help to clarify what we'd like all along and that's to be able to satisfy as many customers as possible with repairing their vehicles and not forcing them to have to go down this path especially with an owner retain situation where they really want to keep this vehicle and have it repaired, having it salvage branded. But we're also big proponents for when this legislation was developed a few years ago, we realize that there a lot of cars being dumped in this state so we needed that but maybe we've gone just a bit too far.

SENATOR BOURNE: And again you don't think that this will necessarily drive your costs up if we increase that, say, 90 percent or eliminate it altogether.

MIKE VARNEY: Frankly, I think that over a period of time we would actually see that we would be saving money because we'd be repairing those cars instead of totalling them out and getting not nearly enough salvage as compared to repair cost where right now we're consistently just having to eat that difference between the salvage and the repair cost which should total up to the value of the vehicle.

SENATOR BOURNE: Understood. Further questions? Seeing none, thank you. Appreciate you taking the time to come down. Further testifiers in support? Testifiers in opposition? Testifiers neutral? Closing is waived. That will conclude the hearing on LB 609 and the hearings for this afternoon. Thank you for coming.